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THE RIGHT TO A FAIR TRIAL IN CRIMINAL CASES INVOLVING THE INTRODUCTION OF CLASSIFIED INFORMATION

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions expressed in this thesis are mine and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other agency.

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35th JUDGE ADVOCATE OFFICER GRADUATE COURSE

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THE RIGHT TO A FAIR TRIAL IN CRIMINAL CASES INVOLVING THE INTRODUCTION OF CLASSIFIED INFORMATION

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ABSTRACT: This thesis examines Military Rule of Evidence 505 and the procedures unique to the prosecution of criminal cases involving classified information. The procedures by which the government can claim privilege and close proceedings to the public raise due process and fairness questions. Also, case law requiring the granting of clearances to any counsel is unfair to the government. Absent modification, these procedures guarantee neither the government nor the accused a fair trial.

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I. INTRODUCTION.

Seldom prosecuted in the military, offenses involving the introduction of classified information[1] are tried using special procedures.[2] This article examines the fairness of the unique procedures applicable to classified information cases.

These cases frequently become the focus of attention in the press.[3] Often involving espionage, they arouse curiosity, and then anger. Because of the threat posed to national security, espionage and related offenses carry with them the maximum penalty of death.[4] Confinement for life and sentences of twenty years are not uncommon.[5] As a result, counsel often find themselves under the magnifying glass of official and public scrutiny.

Despite all the public attention, virtually nothing has been written on the procedures to follow when trying cases involving classified information.[6] This article will focus on the constitutional problems associated with government efforts to protect classified information from unauthorized disclosure while trying to use that information at trial.[7]

To guard classified information from unauthorized disclosure, the government may refuse to grant defense counsel a security clearance and access to classified information.[8] Second, the government may claim that the disclosure of classified information is privileged from disclosure.[9] Lastly, the government may seek to close sessions of the courts-martial from the public.[10]

On the other hand the accused is guaranteed the right to a fair trial. This includes the right to a speedy, public trial;[11] the right to effective assistance of counsel;[12] the right to discover evidence[13] and compel witnesses to testify for the defense;[14] and the right to testify in one's own behalf.

This thesis contends that existing procedures for the trial of criminal cases involving classified information are inadequate and unfair to both the accused and the government. In particular, the procedures leave substantial doubt as to whether an accused will receive a fair trial in cases involving classified information.

First, existing military precedent concerning granting <u>any</u> defense counsel access to classified information is unreasonable and should be judicially reversed.

Second, the notice requirement imposed on the defense by Military Rule of Evidence 505, "Classified Information," is constitutionally defective. This thesis proposes that the President amend the Rule to conform with the reciprocal disclosure requirements of the Classified Information Procedures Act.[15]

Third, while Military Rule of Evidence 505 appears to strike a balance between the interests of an accused soldier and the interest of the government in preserving state secrets, this balance is illusory. There is really no meaningful way for an accused soldier to challenge colorable claims of privilege or government motions to close the proceedings from the public for reasons of national security. Moreover, government use

of ex parte, in camera affidavits to support claims of privilege and motions to close the proceedings make it unlikely that meaningful standards will develop. This thesis proposes prohibiting or drastically limiting the use of ex parte affidavits to support claims of privilege.

Lastly, to the extent classified information must be disclosed at trial, this thesis will examine the circumstances under which trials may be closed to the public. Keeping in mind that the Supreme Court has failed to address any of these issues in a criminal case, this thesis will necessarily focus on Military Rule of Evidence 505, "Classified Information," and its civilian counterpart, the Classified Information Procedures Act.

II. The Right to Counsel and Access to Classified Information.

A. General.

The right to the assistance of defense counsel is an essential ingredient of a fair trial.[16] This right to counsel is an integral part of any court-martial.[17] In fact, accused soldiers enjoy far greater rights to defense counsel than do civilians similarly accused.[18] Irrespective of indigence, the Uniform Code of Military Justice guarantees accused soldiers the right to be represented by military defense counsel free of charge[19] or by civilian counsel accused at no expense to the government.[20] Additionally, at general and

special courts-martial, soldiers enjoy the Sixth Amendment right to counsel.[21] Thus, accused have the right to effective assistance of counsel at every stage of a prosecution,[22] including the right to have counsel present during questioning by military investigators.[23]

Yet, for the accused whose alleged misconduct relates to classified information, choosing a military or civilian counsel isn't quite that simple. Before the accused can disclose classified matters to a defense attorney, the accused must ensure that the attorney has the requisite personnel security clearance, and has been granted access.[24]

The granting of access is separate and distinct from the granting of a security clearance.[25] Generally, when the government determines that an individual can be trusted with classified information, an individual receives a security clearance.[26] Access is the opportunity or ability for individuals to obtain knowledge of classified information.[27] The commander concerned decides whether an individual's duties require access.[28]

Where an accused seeks the assistance of the United States Army Trial Defense Service, finding a counsel with the required clearances and access should not be too much of a problem. The Trial Defense Service will take steps to ensure that a counsel with the requisite clearances and access is made available for consultation or, in the event charges have been preferred, is detailed to represent the accused.

Similarly, where an accused requests individual military counsel, who has or is eligible for a security

clearance and access, there again is little difficulty.[29] Tension between an accused's statutory and constitutional right to counsel of his own selection versus the interest of the government in protecting classified information develops when the accused selects a counsel who is a security risk.

B. Selection of Defense Counsel Who Present a Security Risk.

The possibility of an accused selecting a counsel who presents a security risk is indeed real. Depending on the clearance required to review the classified information, the defense attorney's background for the past fifteen years may be investigated.[30] Defense attorneys with foreign citizenship,[31] spouses with foreign citizenship, or relatives in Viet Nam or other Communist country[32] may be denied a security clearance.[33] Also, those counsel who, while in college, took a year off to travel and had no permanent residence may likewise not receive a security clearance. Similarly, a defense counsel with a poor credit rating or deeply in debt may be deemed a security risk.[34] Of course, any history of mental illness, drug or alcohol problems, past or present affiliations with homosexuals, or certain subversive organizations can result in denial of a security clearance.[35] In view of the detailed investigation conducted in connection with getting a security clearance, it's indeed possible that an accused might select a counsel whose request for a security clearance would be denied. Moreover, to force

the issue, accused might intentionally choose to associate civilian or individual military counsel who won't be cleared.

This brings us back to the question, what about the accused's right to counsel? At first blush, the plain answer would seem to be that the government shouldn't be required to grant a clearance to just any attorney selected by the accused. By regulation no one is entitled to a clearance regardless of his position or duties.[36] Only a few courts have addressed the issue.

In United States v. Jolliff,[37] the defense objected to being required to have counsel submit to the security clearance process. Tried under the Classified Information Procedures Act,[38] the court declined to address the defense's due process objection to the clearance process holding that the accused could not assert due process objections on behalf of his defense counsel.[39] While declaring that it hadn't interfered with defendant's Sixth Amendment right to counsel by requiring defense counsel to submit a request for a security clearance, the court observed that the Act didn't provide the court with the authority to make submission to a security clearance a prerequisite to representing a defendant in a case involving classified information.[40] The court went on to comment, "Although the Sixth Amendment grants an accused an absolute right to have assistance of counsel, it does not follow that his right to a particular counsel is absolute."[41] Thus, Jolliff supports the proposition that the government need not

grant a security clearance and access to any defense counsel selected by accused.

Yet, under existing military case law, the defense can fairly argue that not withstanding defense counsel's lack of a clearance, the accused is entitled to have his defense counsel present at all proceedings even when classified material is presented.[42]

In United States v. Nichols, the Court of Military Appeals held that "the accused's right to a civilian attorney of his own choice cannot be limited by a service-imposed obligation to obtain clearance for access to service classified matter."[43] Noting that Congress could have explicitly required civilian counsel to meet certain qualifications before appearing at courts-martial, the Court also held "that the Uniform Code imposed no qualifications upon a civilian lawyer's right to practice in courts-martial."[44] In dicta, the Court suggested that hearings might be held to disbar counsel from practice before courts-martial, but that the government would have the burden of proving that the defense counsel is disqualified to appear before courts-martial.[45]

Citing Judge Learned Hand's opinion in United States v. Andolschek[46], the Court of Military Appeals left the government with three options: grant access and allow the defense counsel to represent the accused, defer proceeding against the accused, or disbar the defense counsel from practice before courts-martial.[47]

Neither the Uniform Code of Military Justice nor the Manual for Courts-Martial expressly disqualify counsel unable to secure a clearance and access in

cases involving classified information. Individual military or civilian defense counsel are qualified to practice before courts-martial if they are members of the bar of a Federal court or the highest court of a State.[48] In cases where an accused retains a foreign attorney, that attorney must be authorized by a recognized licensing authority to practice law, and the attorney must demonstrate that the attorney has the appropriate training and familiarity with general principals of criminal law applicable to courts-martial.[49]

While a number of grounds for disqualification have developed as a result of provisions in the Uniform Code and decisions of the Court of Military Appeals,[50] no clear judicial rule has developed since Nichols for counsel in cases involving classified information. By regulation, the Army has endeavored to prevent counsel who are security risks from participating in cases involving classified information.[51]

Each Judge Advocate General can suspend attorneys including civilians from practicing before courts-martial for violating rules of conduct prescribed by the Judge Advocate General.[52] By regulation, The Judge Advocate General for the Army has adopted the American Bar Association Model Code of Professional Responsibility to regulate professional conduct[53]. As well as repeated and flagrant violations of this code[54], grounds for suspension of counsel include representing a soldier in a case involving classified information when counsel is a security risk.[55] Procedures for suspending counsel include notice and the opportunity

to be heard[56]. But, there is no indication who has the burden of proof.[57]

A diligent search of the case law fails to reveal any challenges to the validity of this suspension procedure. Nevertheless, in cases involving security, the defense can fairly argue that disbarment for failure of counsel to obtain a security clearance pursuant to Army regulations is tantamount to limiting the accused's right to counsel of his own choice "by a service-imposed obligation to obtain clearance for access to service classified matter."[58] This is precisely what Nichols forbids.[59] Thus, if Nichols is followed the government is left with just two options: either grant access or defer the proceedings. In the event the government declines to disclose classified information to uncleared counsel, deferral of the charges almost always means dismissal of those charges.

The government's response to this disclose or defer requirement is to challenge the Nichols decision seeking its reversal or limiting it to its facts. The case involved information that was ultimately declassified. Also, the civilian defense attorney, a former United States Army Counterintelligence Corps Officer, was clearly not a security risk.

In Nichols, reliance upon United States v. Andolschek[60] is misplaced. Andolschek does stand for the proposition that where material directly touches the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess.[61] Nevertheless, the opinion only held that the trial judge erred where he excluded unclassified reports

prepared by accused.[62] Exclusion rested solely on the basis that Treasury Department Regulations prohibited disclosure of agent reports.[63] No specific privilege was claimed other than the regulatory prohibition. Thus, Andolschek doesn't address the issue of the government's right to protect national security.

As noted in the concurring opinion in Nichols,[64] certainly the government should have the right to take reasonable steps to prevent disclosure of classified information to possibly disloyal persons.[65] The government should be prepared to demonstrate by a preponderance of the evidence[66] that the selected counsel presents a security risk. The Defense Investigative Service background investigation and agency checks should be presented. The government should urge the military judge to balance the security interests of the government against the accused's right to counsel.

Moreover, there will most often be a substantial number of lawyers who pose no security risk and will be granted access. The accused should have no difficulty in selecting another counsel who can be granted access. When balancing the right of the accused to defense counsel of his own choice versus the right of the government to protect classified information, limiting the accused selection in this manner will not deny a substantial right.[67]

Additionally, the Military Rules of Evidence authorizes the military judge, at the request of the government, to issue a protective order requiring security clearances "for persons having a need to examine the information in connection with preparation

of the defense" prior to disclosure to the defense.[68] Thus, without reliance upon a "service imposed regulation" the government can seek a protective order preventing release of classified information to a defense counsel without a clearance.

Where the accused requests an individual military counsel who lacks the requisite clearance, the requested counsel's commander could determine that the counsel wasn't reasonably available.[69] In determining whether a particular counsel is available, the responsible authority may consider "all relevant factors, including, but not limited to . . .the nature and complexity of the charges and legal issues involved in the case."[70] Thus, where individual military counsel presents a security risk, the commander could simply decide that the requested counsel is unavailable. Again, this may run a foul of the holding in Nichols.

Nichols disclose or defer requirement is simply unfair to the prosecution. Rather than disclose classified information to counsel who present a security risk and for reasons unrelated to guilt or innocence, the government would in some instances choose not to prosecute. Moreover, accused facing charges involving classified information could intentionally select counsel to force the government to withdraw the charges. Therefore, Nichols should not be followed.

C. Limitations Upon Defense Counsel Who Are Granted a Clearance and Access.

Once the government decides to take steps to grant counsel security clearances, the routine process of granting the clearance may take a substantial period of time.[71] However, certain officials are authorized to grant interim clearances pending the completion of personnel security investigations.[72] Additionally, waivers of certain requirements can be sought through Staff Security Offices from the Office of the Assistant Chief of Staff for Intelligence, Headquarters, Department of Army.[73] Ordinarily, proceedings will have to be delayed while the Army goes through the processing of the clearance.[74] To avoid inordinate delays and any attendant speedy trial problems,[75] the government may have to seek waivers or interim clearances.

Upon granting defense counsel clearances and access, the prosecution must decide what reasonable limits it will seek to place upon the handling of classified material.[76] If discovery is sought prior to referral of charges, the government may disclose classified information subject to conditions that will minimize unauthorized disclosure.[77] After referral, the government must request that the military judge issue a protective order to regulate defense handling of the classified information.[78]

Whether conditions are imposed by the government prior to referral or incorporated in a protective order issued by the military judge[79], the following safeguards may be ordered: (1) requiring storage of clas-

sified material in an appropriate safes,[80] (2) requiring controlled access at government facilities,[81] (3) requiring the defense to maintain logs recording who has had access to the classified information (as authorized by the military judge),[82] and (4) regulating handling of defense notes and working papers containing classified information.[83]

While these requirements are reasonable and, part of the everyday work place for those who routinely handle classified information, they can present a significant burden for the defense. Counsel can no longer work in their office; it may become necessary to work with classified material at a designated security area.[84] Rather than reviewing material at their convenience, defense counsel could be required to check out classified material including their working papers.[85] Preparation of documents which contain classified material can't be prepared on just any typewriter or wordprocessor. Wordprocessors may have to be approved for the preparation of classified documents.[86] Typewriter ribbons which contain classified information must also be securely stored.[87]

These requirements may result in the government assigning security personnel to regulate the handling of classified information by the defense.[88] Also, the government may choose to provide the defense with separate work and classified storage areas.[89]

Servicemembers have challenged security requirements designed to guard against unauthorized disclosure of classified information.[90] In DeChamplain v. McLucas, an Air Force sergeant, whose previous convic-

tion for espionage related offenses had been set aside,[91] persuaded a district court that security limitations sustained by the military judge at the retrial abridged the accused's right to a fair trial.[92] At the retrial, the Air Force had granted military counsel, one civilian counsel, one legal associate of the civilian counsel, and one secretary access to some, but not all the classified information related to the case.[93] Classified information made available was to be examined in the presence of persons with appropriate security clearances. No photocopying of information was allowed. Written notes would be examined by Air Force security personnel and notes containing classified information were to remain in Air Force custody, and members of the defense could only discuss classified information with those granted access.[94]

The defense urged that these limitations were overly restrictive. Civilian Defense counsel sought authorization to classify documents himself. Furthermore, he sought permission to discuss the classified information related to the case with various experts.[95] Finding that the defense should be granted full and unlimited access to all documents relevant to the case, subject to an appropriate protective order, the district court granted a preliminary injunction. Unfortunately, the district court objected to the restrictions as a whole "as clearly excessive" without commenting on the merits of each limitation.[96] Not reaching the fairness of the restrictions imposed on the defense and citing Schlesinger v. Councilman[97], the Supreme Court reversed.[98] Finally, at his retrial, the

accused pled guilty and the issue of restrictions, if they remained in force, was not addressed on appeal.[99]

Thus, DeChamplain is of little value in deciding whether security restrictions are fair to the defense. Moreover, DeChamplain was decided before the Military Rules of Evidence and the Classified Information Procedures Act addressed defense handling of classified information.

In the only reported military case addressing security restrictions placed on counsel since the Military Rules of Evidence went into effect, the defense consented to an unusual procedure whereby a non-lawyer officer senior to the accused was assigned to the defense team to screen communication of classified information between the accused and his attorneys.[100]

In United States v. Baasel, an electronic warfare officer, assigned to a strategic reconnaissance unit and charged with filing false claims and writing bad checks, requested that the convening authority grant his civilian and military counsel access to information related to the officer's classified duties.[101] The convening authority denied that request, but offered to assign an officer authorized access to assist the defense team. It was understood that the this officer would not be called as a witness and that all communications between the accused and the defense team remained privileged.[102]

When the accused wished to communicate potentially classified information to his defense attorneys, the accused would write out what he wished to communicate

and hand it to the cleared officer. If the communication contained classified information, the cleared officer would so advise the accused that disclosure to the defense was not authorized. Then the government would have to take steps to claim that the communication was privileged under Military Rule of Evidence 505. The defense accepted the convening authority's offer and the cleared officer screened communications from the accused to counsel; however, no information was ever screened out.[103]

No communications between counsel and accused were blocked, so the classified information procedures under Military Rule of Evidence 505 were never invoked.

The defense objected that this procedure infringed upon accused's right to assistance of counsel. While noting that the screening requirement was burdensome, the Air Force Court of Military Review held that "in the absence of any significant impediment which prevented full and effective communications during the defense process, we find that the appellant was not deprived of his constitutional rights under the Sixth Amendment to have the assistance of counsel for the defense."[104]

In cases related to classified information, the defense should endeavor to limit Baasel. First, an objection should be made to the assignment of any lay-officer as part of the defense team. Second, the should distinguish Baasel pointing out that classified information was not central to any of the charges in Baasel, nor did classified information relate to any defense. In Baasel, the defense simply urged that the

accused officer was a pathological gambler without demonstrating a particularized need for classified information concerning the accused's duties. While good military character can always be part of one's defense either on the merits or in extenuation and mitigation, it's unlikely that specific classified information need be revealed. In Baasel, apparently the accused couldn't even think of any classified information relevant to his defense.

Of course, the prosecution should argue that until distinguished, Baasel is applicable to cases involving classified information at least where classified information is tangentially related to the case. And the screening of communication can be required whenever counsel have not been granted security clearances and access equal to or greater than those of the accused.

In any event, certainly the established security requirements generally applicable to the handling, storing, and accounting of classified documents,[105] are reasonable limitations which should be imposed on counsel.

III. The Right to Discovery and the Classified Information Privilege under Military Rule of Evidence 505.

Assuming that the granting of clearances and access to the defense is resolved, the next issues that arise in a case involving classified information are, first, to what extent must the government provide discovery of classified information and, second, to what extent may the defense disclose or cause the

disclosure of classified information. The right to discover evidence helpful to the defense[106] and to present that evidence are essential ingredients of a fair trial. The Sixth Amendment of our Constitution guarantees the accused the right of compulsory process to present evidence.[107] On the other hand, evidentiary rules have always included certain privileges.[108] This section examines the accused's interest in discovering and using classified information and the government's interest in preventing such disclosure and use.

A. Historical Background.

Since the early nineteenth century Federal courts have recognized government claims of executive privilege to prevent the disclosure of official information.[109] But, it wasn't until well after the Civil War that the Court recognized a military or state secret privilege in a case where the government was forced by the court to withhold information that the government was prepared to disclose.[110] In United States v. Totten,[111] the Supreme Court held that "public policy" prohibited maintaining suits in which confidential military information would necessarily be disclosed.[112]

Although in the next seventy-five years Federal courts occasionally addressed, in civil suits, the issue of government privilege to protect against the disclosure of classified information,[113] it wasn't until World War II that a Federal court examined the issue in a criminal case.[114]

In United States v. Haughen,[115] a district court observed that the right of the Army to refuse to disclose confidential information is indisputable. Relying on Department of Army Regulation 380-5 and a War Department refusal to disclose the contents of a secret contract concerning the serving of meals at a then highly secret plutonium manufacturing plant,[116] the court barred the defense from examining the contract which was clearly relevant and material to the accused's defense.

The defendant had been charged with counterfeiting meal tickets to defraud the United States. Whether the organization defrauded was an agency of the United States was an element of the offense. This issue could best be resolved by an examination of the contract; however, the defense was never permitted to review the contract. A War Department attorney testified concerning unclassified portions of the contract.

This is the only reported case where relevant and material information, necessary to the defense of a criminally accused has been held privilege. This case can best be explained as a wartime aberration which relied in part on the war power of the Executive branch.[117]

In United States v. Reynolds,[118] the Supreme Court first outlined the procedure by which the government may assert claims of military or state secret privilege. The court noted that the privilege against revealing military secrets was well established. The court decided that the privilege could only be invoked

after personal consideration by the officer heading the department which controls the secret material.[119]

In connection with wrongful death actions, the plaintiffs in Reynolds sought discovery of information concerning the crash of B-29 while testing secret electronic equipment. The Court noted that in a civil case, plaintiffs have no right to classified information.[120] The Court distinguished plaintiffs' civil case from the criminal cases[121] in which the Second Circuit barred claims of government privilege in criminal prosecutions unrelated to classified information.[122]

Since Reynolds, the Supreme Court has examined executive privilege,[123] but not with respect to state or military secrets.[124] Thus, the issue of privilege with respect to classified information in a criminal case has yet to be addressed by the Supreme Court.[125]

Prior to the Military Rules of Evidence, the invoking of privilege to protect classified information was unknown to military practice. Moreover, the Court of Military Appeals decision in Nichols[126] and decisions of the service Boards of Review expressly rejected government efforts to prevent the disclosure of classified information at courts-martial.[127]

In United States v. Dobr, where the government prevented disclosure of classified information at trial by ordering defense counsel not to disclose the existence of such information to the military judge, the Army Board of Review set aside the conviction holding that the defense "must be free to introduce any evidence otherwise admissable that he deems necessary

for the defense of his client unfettered by command coercion."[128] The Board wrote: "We further desire to point out that in a prosecution where testimony or documents involve classified information and are relevant to any issue, either for the government or defense, the Government must make an election either to permit the introduction of said classified evidence or to abandon the prosecution."[129] Thus, the Board made no allowance for government claims of privilege to guard against the disclosure of classified information.

Similarly, where the president of a court-martial stopped a witness from disclosing classified information at trial, the Air Force Board of Review reversed holding that "the fact of classification does not have any bearing on whether the evidence should ultimately be admitted."[130] Without addressing the issue of the government invoking privilege or closing the court, the Board presumed that the government had the choice of introducing the information or withdrawing the prosecution[131].

As already discussed, chiefly citing United States v. Andolshcek,[132] the Nichols decision rejected government refusals to disclose classified information to the defense.

Likewise, before Military Rule of Evidence 505, no Manual for Courts-Martial addressed whether a military secrets privilege existed. The former rules of evidence applicable to courts-martial[133] noted that it might be necessary sometimes to introduce "confidential or secret" evidence.[134] While recognizing that investigations of the Inspectors General were privi-

leged, for classified information only guidance on clearing the court of spectators is provided.[135]

Thus, while civilian law has long recognized the exercise of executive privilege to protect military or state secrets, the claiming of that privilege to prevent disclosure of classified information was unheard of prior to the Military Rules of Evidence.

B. Military Rule of Evidence 505. "Classified Information"

Military Rule of Evidence 505 became effective on September 1, 1980, along with the rest of the then new Military Rules of Evidence.[136] While many of the rules are identical to or very similar to corresponding rules in the Federal Rules of Evidence, the military rules regarding evidentiary privileges greatly expanded upon the single Federal Rule addressing privileges.[137]

(1) Legislative History.

Military Rule 505 was based on legislative efforts to regulate the disclosure of classified information in Federal courts.[138] As early as 1977, the Senate began studying the issue of the disclosure of classified information in connection with criminal prosecutions.[139] Senate staffers interviewed dozens of officials from the Department of Justice, the Department of State, the National Security Agency, the Central Intelligence Agency, and the Defense Intelligence Agency.[140] The Senate Select Committee on

Intelligence issued a report in 1978 voicing concerns about the difficulty of enforcing the laws protecting national security.[141]

Of particular concern was the problem of "gray-mail" -- defense threats, frequently legitimate, to disclose classified information during the course of the trial.[142] The Report noted: "The more sensitive the information compromised, the more difficult it becomes to enforce the laws that guard national security . . .[because] . . . the government must often choose between disclosing classified information in the prosecution or letting the conduct go unpunished."[143] The report concluded: "Congress should consider the enactment of a special omnibus pre-trial procedure to be used in cases when national security secrets are likely to arise in the course of criminal prosecution."[144]

In response, the House and Senate each held hearings[145], and three bills concerning classified information procedures were introduced in Congress.[146] Military Rule of Evidence 505 was based on the administration sponsored bill.[147] Dropping the administration bill, the House Committee on Intelligence favorably reported its bill.[148] Before they issued their report, the President signed Rule 505 with the rest of the Military Rules of Evidence.[149]

Eventually, House and Senate conferees adopted the Senate bill with minor modifications.[150] The modified Senate bill was enacted into law as the Classified Information Procedures Act.[151] Thus, the provisions of the Rule 505 and the Classified Informa-

tion Procedures Act appear, for the most part, to be patterned after one another and are in some instances textually identical.[152]

(2) Disclosure of Classified Information to the Defense.

Both Rule 505 and the Classified Information Procedures Act authorize disclosure of classified information to the defense.[153] Under both procedures, disclosure to the defense can be made subject to a protective order issued by the court.[154] Upon motion, the court may authorize[155] the government to admit facts in lieu of providing specific classified information.[156] Alternatively, the government may delete or substitute specific items of classified information in documents.[157]

Government motions to delete, to substitute, or to admit facts in lieu of full disclosure and materials submitted in support of the motion may be reviewed by the judge alone without disclosure to the defense.[158] Both the Federal and Military procedures authorize use of ex parte proceedings, which this paper will discuss in greater detail later in Part B.5. Of course, if deleted or substituted classified information is necessary to the defense, the judge can deny the motion.

(3) Notice Requirements Concerning Defense Disclosure of Classified Information.

Both Rule 505 and the Classified Information Procedures Act require the accused to provide notice of any intention to disclose or cause the disclosure of classified information.[159] The notice provisions, coupled with the in camera hearing procedures, are the real heart of the procedures designed to guard the government's interest in protecting classified information.

At courts-martial and in federal court, the accused is required to provide the government with advance notice of intentions "to disclose or to cause the disclosure of classified information in any manner."[160] The notice must include a brief description of the classified information.[161] A general statement of the classified areas the defense will cover is insufficient.[162] The government must have sufficient notice so that it can make an informed decision either acquiescing to the disclosure, claiming privilege, or abandoning the prosecution. As noted by the Eleventh Circuit, permitting vague, non-specific notices of intent to disclose classified information is tantamount to graymail and must not be permitted.[163]

Ignoring the plain language and legislative history of the notice requirement, one writer has concluded that "the government is not entitled to disclosure of intended [defense] cross-examination under the rubric of Rule 505(h)."[164] He suggests that the well prepared prosecutor should be charged with knowing everything his own witnesses know relevant to their direct examination. The writer further concludes

that it serves no just purpose to tell the government what its own witnesses know.[165]

These conclusions should be rejected for four reasons. First, notice is required if the defense "reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a trial or pretrial [court-martial] proceeding."[166] The plain meaning of this broad language includes disclosures of classified information caused by defense cross examination. Had the drafters of either the military rule or the Classified Information Procedures Act section intended to except defense cross form the notice clearly the drafters wouldn't have used the phrase "in any manner in connection".

Second, the purpose of the notice requirement is to afford the government the opportunity, prior to trial, to object to the defense disclosing specific classified information.[167] Moreover, the drafter's analysis to the Rule provides that the purpose of the notice section is to give the government an "opportunity to determine what position to take concerning the possible disclosure of that information."[168] Creating an exception for cross-examination, again permits the defense to graymail the government.

Third, the legislative history of the virtually identical notice requirement of the Classified Information Procedures Act clearly establishes that the drafters of the language intended to include defense cross-examination.[169] The Senate Committee Report provided: "The [notice] subsection is intended to cover not only information that the defendant plans to

introduce into evidence . . . but also information which will be elicited from witnesses and all information which may be made public through defendant's effort."[170] Clearly, it was contemplated that notice would apply to defense cross-examination as well as direct.

Fourth, it is unreasonable to charge even a well prepared prosecutor with knowing everything government witnesses may know relevant to their testimony on direct. Gone are the days when the prosecution vouched for the credibility of its witnesses.[171] Especially in cases related to compartmented classified information, it is possible that the accused may have had access to classified information known to a witness affecting the credibility of that witness, but not known to the prosecution. Thus, it's ludicrous to charge the prosecution with constructive knowledge of the answers to all defense cross-examination questions. Clearly, the notice requirement of Rule 505 should apply during every session and to all testimony.

Both Rule 505 and the Classified Information Procedures Act impose upon the defense a continuing duty to provide notice of any intention to disclose classified information.[172] Also, the sanction for failing to comply with the notice requirement is harsh. Failure to provide the required notice may preclude the defense from disclosing the classified information, or the court may prohibit defense examination of any witness with respect to the classified information for which notice was not provided.[173]

(4) Reciprocal Notice.

The notice requirements of the two rules differ in one key respect. The Classified Information Procedures Act provides that when the court authorizes the defendant to disclose classified information, for which notice must have been provided, the court shall direct the government to provide the accused with any information it expects to use to rebut the classified information.[174] Military Rule of Evidence 505 contains no such reciprocal obligation.[175]

Congress included this reciprocity because of concerns that due process required it.[176] Generally, where criminal procedures require the defense to disclose evidence it intends to offer at trial, the government is required to disclose the evidence it will offer in rebuttal.[177] Because no reciprocal notice is required under Rule 505, a strong argument can be made for the proposition the notice requirement imposed on the defense is constitutionally defective.

In Wardius v. Oregon,[178] the Supreme Court examined a state notice of alibi requirement holding that "[d]ue process of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants."[179] Having held in a previous case that notice of alibi rules with reciprocal discovery did not deprive an accused of due process or a fair trial,[180] the Court in Wardius said: "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concern-

ing refutation of the very pieces of evidence which he disclosed to the state."[181]

Though the notice requirements of Rule 505 have never been challenged, the parallel notice requirements of the Classified Information Procedures Act have.[182] Requiring the defense to provide notice of intent to disclose classified information has been sustained because the Act imposes a reciprocal notice requirement on the government.[183]

Certainly, Rule 505 must be amended to provide for reciprocal notice concerning classified information the defense intends to disclose similar to the requirement imposed on the government by the Classified Information Procedures Act.[184] Adapted from the Federal procedure, a proposed provision to add to Rule 505 appears at Appendix B to this thesis.

In Wardius, the Supreme Court also held that with a strong showing of government interest to the contrary, reciprocity might not be required.[185] Similarly, under the Classified Information Procedures Act, the court need not order reciprocity unless fairness requires it.[186] Thus, while there may exist an isolated case where the military judge need not order reciprocal disclosure of government rebuttal, the better practice is to direct such reciprocity.

Until Rule 505 is amended, the defense will be able to successfully challenge should object to the notice requirement of the rule. Absent compelling reasons, the military judge should require the government to provide reciprocal notice of rebuttal evidence. Doing otherwise invites error and is simply unfair.

(5) Claiming the Privilege.

Whenever the government claims that classified information is privileged from disclosure the issue of fairness arises.

There are two circumstances in which the government can claim that classified information is privileged from disclosure. First, the government may claim privilege to prevent the accused from disclosing information about which the accused already knows. Once the accused provides notice of his intent to use or disclose the information at trial, the government decides whether to claim privilege, to declassify the information, or otherwise allow release.

Second, the government may claim privilege to prevent the defense from discovering information which the government normally provides, if the information were unclassified. Though these two sets of circumstances present different concerns which will be discussed separately, the procedure for claiming the privilege is the same.

Rule 505 requires that the "head of the executive or military department or government agency concerned" claim the privilege or authorize the trial counsel or a witness to make the claim.[187] While not having addressed the issue of delegation, the Supreme Court has held that the head of the department or agency having control over the matter must claim privilege only after "actual personal consideration by that officer."[188] Thus, trial counsel should seek a

personal determination from the Secretary of the Army for classified information controlled by the Army.

For courts-martial involving top secret or sensitive compartmented information, trial counsel stationed overseas may encounter significant difficulties because of restrictions placed on the transportation or transmission of classified information.[189] Even in the United States, preparation and communication of highly classified, compartmented information may require the detailing of special couriers to deliver the information to Department of Army Headquarters.[190]

Under the Rule, the department head must decide the following: (1) that the information is properly classified, and (2) that disclosure of the information would be "detrimental to national security."[191] Information is properly classified when the United States Government has determined "pursuant to an executive order, statute, or regulation . . . [that the information] require[s] protection against unauthorized disclosure for reasons of national security . . ."[192] The executive order concerning national security information defines classified information as information or material "unauthorized disclosure of which reasonably could be expected to cause damage to national security."[193] Thus, if material is properly classified, then its unauthorized disclosure is by definition detrimental to national security and the two findings of the Department head are redundant.

Aside form the broad language in the Executive Order, there is no specific guidance on what informa-

tion should be classified. The Order also lists broad classification categories including information concerning "military plans, weapons, or operations; . . . foreign government information; . . . intelligence activities(including special activities), or intelligence sources or methods; . . .foreign relations or foreign activities of the United States; or other categories of information . . . as determined by the President or [certain executive officials]. . ."[194] But, again information pertaining to these categories should be classified when it is determined that unauthorized disclosure, "either by itself or in the context of other information, reasonably could be expected to cause damage to the national security."[195] While the Executive Order nowhere defines national security, Rule 505 and the Classified Information Procedures Act define national security as "national defense and foreign relations of the United States."[196]

With this sort of vague guidance, it's almost impossible for an accused to successfully challenge an agency head's assertion that disclosure of certain information would be detrimental to national security. As a practical matter, finding a knowledgeable expert to testify is virtually impossible.

Most all classification experts are employed by the government either directly or through defense contractors. Finding a witness who disagrees with the view of his department is hard enough in and of itself, but considering that classification expert's livelihoods depend on keeping programs classified, there is a general tendency to over-classify (unless the security

requirements incident to the classification are so onerous that there is pressure to downgrade the classification). In a way, security requirements including classification of information are like safety requirements. Security, like safety, is of critical importance and yet at some point security costs (as well as safety costs) exceed the cost of compromise (as well as injury). Finding a senior intelligence expert competent to evaluate classification determinations is simply not possible.

About the only way to challenge the classification of information is to urge that it has already been disclosed or is generally known. However, appearance of classified information in newspapers or any unofficial publication as well as inadvertent, unauthorized disclosure doesn't automatically result in declassification.[197] Moreover, unauthorized disclosure of intelligence sources or methods, identity of foreign confidential sources, and foreign government information are all presumed to cause damage to the national security.[198] Again, executive materials addressing classified information provide little opportunity to challenge an Agency head's privilege determination.

As can be expected, the courts have been extraordinarily deferential in reviewing executive agency decisions related to national security. Claims of privilege for military secrets are entitled to the "utmost deference."[199] In examining a claim of privilege, the court should only be satisfied that "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the

interest of national security should not be divulged."[200] As one circuit has noted: "The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classification in that area."[201]

While only a few criminal cases have involved challenges to government claims that classified information is privileged, under the Freedom of Information Act,[202] the government routinely claims that classified information is exempt from disclosure. Again, courts are very deferential to agency classification decisions.[203] Because the significance of individual items of classified information may appear trivial except when combined with other information, courts have routinely sustained the withholding of superficially "innocuous information."[204]

Thus, three factors -- the unavailability of experts to challenge security determinations, the vague classification guidance, and the deference of judicial review -- leave the defense with no fair opportunity to successfully challenging Army claims that classified information is privileged.

(6) Ex Parte, In Camera Review of Materials.

Once the government claims privilege with respect to specific items of classified information which have not been disclosed to the defense, both Military Rule of Evidence 505 and the Classified Information Procedures Act permit the prosecution to submit motions limiting disclosure to the defense. These motions and

material in support of thereof may be submitted to the court without disclosing the motions or materials to the defense.[205]

The government makes these motions when required to provide exculpatory material, to comply with the requirements of the Jencks Act, or in connection with defense discovery requests. For example, supposing the defense requested copies of all travel vouchers submitted by certain government witnesses who worked with the accused during a certain period. If inflated, the vouchers might be used on the merits to impeach the government witness or in extenuation and mitigation to show that padding vouchers by intelligence operators was widespread and perhaps condoned. Claiming privilege, the government moves to prevent disclosure of the vouchers urging that the vouchers reveal overseas operating locations of highly sensitive operations. Redaction or excision of specific entries which would tend to show where the witnesses were, including dates, locations, airfares, and hotel rates, render the vouchers useless to the defense. The government submits the vouchers to the military judge with a detailed explanation of how the vouchers show where the witnesses operated overseas and why these locations shouldn't be disclosed to the defense.

The military judge reviews these materials alone and decides whether "the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence."[206] If the judge decides that disclosure is not warranted, the records of the proceeding and ex

parte materials are sealed and included with the record trial for appellate review.[207] Where the military judge decides that disclosure is warranted, the government may offer a statement admitting facts, portions of the material, or summaries in lieu of disclosure.[208] The judge re-evaluates the original classified information to determine if disclosure is still required in light of the government offered alternatives.[209] Once the military judge determines that disclosure is still warranted and the government objects to the disclosure, the judge must issue "any order that the interests of justice require."[210] Alternatives include: declaring a mistrial;[211] dismissing some or all of the charges, with or without prejudice;[212] finding against the government on an issue related to the non-disclosed evidence;[213] or precluding a witness from testifying.[214] Yet, if, in response to the order, the government provides disclosure and permits disclosure at trial, then the government avoids the sanctions.[215]

Unlike the Classified Information Procedures Act, Rule 505 contains no provision for interlocutory appeals of these orders.[216] However, at courts-martial where punitive discharges may be adjudged, the government may appeal orders dismissing charges or excluding material testimony.[217]

Where classified information has been disclosed to the defense and the defense provides notice of intent to disclose that information at trial, this same procedure can be invoked by the government to prevent disclosure at trial. Because the defense already has

access to the information, there is no need for an ex parte review of the materials by the military judge. In litigating the privilege issue, the government may move to close the proceedings to the public (The issue of closing the court to the public will be examined in detail).

In those instances where the classified information in issue has already been disclosed to the defense, the party who loses on the issue of disclosure at trial, can still prevail urging that the classified information be disclosed on the merits at a closed session. Unlike the Classified Information Procedures Act, Military Rule of Evidence 505 expressly provides for the exclusion of the public form courts- martial during portions of testimony disclosing classified information.[218]

Where the government is dissatisfied with the military judge's ruling rejecting alternatives to full disclosure, the trial counsel could move to have full discloure of classified information at sessions closed to the public. Similarly, when the defense is dissatisfied with rulings authorizing less than full disclosure at trial, the defense could likewise move for full disclosure at closed sessions. Thus, resolution of conflicts over full disclosure at the court-martial proceeding itself presents little difficulty.

Greater difficulties arise when the government moves to prevent full disclosure of classified information not only at trial, but also to the defense. As previously noted, both the Classified Information Procedures Act and Rule 505 authorize the government to

submit material in support of other than full disclosure for the judge to consider alone.

Relying on Alderman v. United States,[219] the defense should always object to any ex parte, in camera examination of classified information by the military judge as violative of the accused's right to due process and right to effective assistance of counsel. In Alderman, the Supreme Court rejected the government's proposal that the trial judge screen recording tapes of conversations and then authorize the disclosure of "arguably relevant" conversations to the accused.[220] The government conceded that the taped conversations were the product of unlawful wiretaps. The Court held that the "task is too complex, and the margin for error too great to rely wholly on the in camera judgement of the trial court."[221] The Court further observed that "the need for adversary inquiry is great where increased by the complexity of the procedure and consequent inadequacy of ex parte proceeding."[222] Frequently, only defense counsel knows how each bit of evidence fits in his theory of the case.

Alderman addressed a consolidation of cases, including an espionage conviction.[223] Although the defendant had not been a party to all the recorded conversations and therefore was seeking access to information which had never been disclosed to him, the majority opinion rejected in camera screening by the court. Instead, the court directed release of all the tapes subject to a protective order where appropriate.[224] Commenting on the inadequacy of this

procedure, Judge Harlan noted: "It is quite a different thing to believe that a defendant who probably is a spy will not pass on to the foreign power any additional information he has received."[225]

Later that term, in a per curiam decision, the Supreme Court retreated from its apparent rejection of in camera, ex parte process. In United States v. Taglianetti,[226] the court decided that "[n]othing in [Alderman et. al.,] . . . requires an adversary proceeding and full disclosure for resolution of every issue raised by electronic surveillance."[227] Whether full disclosure was required depended on the likelihood that the court could make an accurate determination of the issue without the benefit of an adversary proceeding.[228] Thus, the test becomes whether the determination is so complex that an adversary proceeding is necessary. Applying this test, the Third Circuit Court of Appeals sustained subsequent ex parte screening by the court on remand in the Alderman companion cases involving classified information.[229]

Generally finding that disclosure issues are not so complex as to require adversary proceedings, Federal courts have consistently overruled challenges to in camera, ex parte procedures where disclosure of classified information is requested. Under the Freedom of Information Act,[230] use of such procedures have been consistently sustained.[231] Of course, if a court errors in failing to disclose information, a plaintiff seeking information under the Freedom of Information Act, has less at stake than does an accused. Despite this concern, under the Foreign Intelligence Surveil-

lance Act of 1978,[232] use of ex parte, in camera procedures have been consistently upheld in connection with criminal proceedings.[233]

Under the Foreign Intelligence Surveillance Act, the government must seek, with a few exceptions, a court order from the United States Foreign Intelligence Surveillance Court before engaging in electronic surveillance for foreign intelligence purposes.[234] To use evidence developed as a result of such surveillance in criminal proceedings, the United States Attorney General must approve and notice is sent to the court and the accused.[235] The accused may challenge the legality of the intercept in Federal District Court; however, all materials in support of the electronic surveillance authorization may be reviewed ex parte, in camera by the court.[236] To date, no accused has successfully challenged either the ex parte procedure or any intercept.[237]

Similarly, under the Classified Information Procedures Act, courts have consistently sustained the ex parte, in camera process of review of classified information not already disclosed to the defense.[238] So to successfully challenge the absence of an adversary procedures, the defense must demonstrate that determinations of relevance and necessity are so complex that sufficient accuracy can not be assured with only ex parte screening by the military judge. Of course, this is extraordinarily difficult to do without access to the information. In many instances, any claim of complexity will lack "concreteness" and be little more than "pure assertion."[239]

This issue has not been squarely addressed by the courts nor has it been frequently raised in cases involving classified information. But, the Supreme Court has granted a certiorari petition on the issue of in camera, ex parte disclosure determinations in a rape case involving confidential records held by a state child welfare agency.[240]

Where the military judge fails to authorize full disclosure to the defense, military defense counsel should make a motion for appropriate relief[241] requesting that full disclosure be made to counsel, but not the accused. Full disclosure could be made to defense counsel subject to a protective order prohibiting counsel form disclosing the information to the accused. After disclosure to counsel, the military judge could then afford the defense an opportunity to articulate a need for further disclosure to the accused. Where counsel has been granted a security clearance and general access to specific classified programs, the government will be hard pressed to explain how disclosure to counsel has an adverse impact on national security.

In United States v. Lopez,[242] a district court limited disclosure when it excluded the defendant and the public, but not defense counsel, during testimony about airline hijacker profiles. The court indicated that if counsel could articulate a need for discussing the profile with his client, the court would reevaluate its decision preventing disclosure to the accused.[243] Similarly, where the military judge authorizes other

than full disclosure, counsel should request full disclosure for only themselves, not the accused.

Lastly, where the government submits materials explaining why classified information must not be disclosed to the accused to the military judge for his consideration ex parte, the defense should likewise submit a detailed argument for ex parte consideration explaining why the undisclosed classified information is relevant and necessary to the defense. This can prevent premature disclosure of defense theories providing the government with less time to prepare rebuttal. Also, it fairly puts the parties on a more equal footing. Neither the Classified Information Procedures Act nor Rule 505 expressly authorize ex parte motions by the defense. Nonetheless, under the Classified Information Procedures Act, the trial court employed precisely this procedure in United States v. Clegg.[244] Similarly,in United States v. Jenkins,[245] where the government claimed privilege with respect to the location of a surveillance site in a drug case, a District court directed the government to disclose the site to counsel with a protective order prohibiting disclosure to the accused or anyone else absent the court's further authorization.

Government requests for in camera, ex parte review of classified documents and materials in support of other than full disclosure can place the accused at a significant disadvantage where complexity makes an accurate ex parte determination less probable. The defense should always seek full disclosure for the accused. Proposing that only cleared counsel review

the evidence as was done in Lopez and Jenkins is a workable alternative. As a last resort, the defense should file ex parte responses to government ex parte efforts to prevent other than full disclosure.

Fairness requires that unless extraordinary factors are present, trial courts should decline to consider ex parte motions.

(7) Substantive Balancing the Claim of Privilege versus the Defense Need for the Information.

Military Rule of Evidence 505 provides that classified information is privileged form disclosure "unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence."[246] No military courts have construed this language, and the Classified Information Procedures Act doesn't include any codification of the standard to be applied in weighing government claims that classified information is privileged from disclosure.[247] However, federal courts which have considered the issue of what standard to apply to claims that classified information[248] is privileged have turned to cases where the government claims that an informant's identity is privileged from disclosure.[249]

In Rovario v. United States,[250] the Supreme Court examined a government claim that the identity of an informant who received heroin from the accused was privileged from disclosure in a prosecution related to the heroin transfer. While in Rovario the Court

rejected the claim that the informant's identity was privileged based on the facts of the case, the Court established a balancing test that calls for weighing "the public interest in protecting the flow of information [to the police] against the individuals right to prepare his defense."[251] The Court also held the accused's interest in disclosure prevails when "disclosure of an informant's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause."[252]

Thus, federal courts have sustained government claims of privilege at suppression hearings where police officers testify about an informant's track record as informant.[253] Similarly, the government has avoided disclosing the exact location of an observation or surveillance post[254] as well as the location of hidden electronic eavesdropping devices.[255] And the government need not disclose other sensitive law enforcement or crime prevention techniques including hijacker profiles[256] or the hidden location of motor vehicle track sheets containing serial numbers of parts.[257]

In each instance where courts have sustained government claims that informant identities or surveillance locations were privileged, they have decided that the requested information is not helpful to the defense. This determination is neither complex nor difficult in most cases. For example, where the jury sees a video tape of the actual drug transaction, the apartment from which it is filmed becomes immaterial

even though the defense asks about the exact location of the observation post for the purpose of showing that the police officer's view was obstructed.[258] Similarly, the location of wiretap which is ordinarily relevant and necessary if an expert witness testifies about audio distortion, becomes immaterial if, judging for itself, the trier of fact listens to the recorded conversations.[259]

Yet, in some instances, the defense can not show that it needs certain information unless it first gets the privileged information. For example, at a suppression hearing a police officer testifies about evidence supplied by an informant resulting in arrest or search. Without knowing who the informant is, it is virtually impossible to effectively cross-examine the officer with any specificity concerning the informant's track record. The defense needs to know, first, who the informant is and, second, to have the opportunity to independently investigate the matter. Without this information, the defense is simply stuck with the police officers testimony, which may not be truthful or accurate. Yet, in this very instance disclosure is not required.[260]

Despite this dilemma, courts have consistently struck the balance in favor of the government.[261] The accused must offer more than speculation before a court will find that an accused's interest in disclosure prevails.[262] Before ordering disclosure, the court must find that the informer's testimony is "highly relevant."[263]

Also, the privilege doesn't give way because the accused knows who the informant is.[264] The government may still have a significant interest in protecting the informant's identity from further disclosure.[265] Also, even if the informant's identity is well known, the government may have an interest in protecting the informant's location or address from disclosure.[266]

Turning to government claims that classified information is privileged from disclosure, it makes sense to have courts likewise balance the government's interest in non-disclosure against the accused's need for the information. Under the Classified Information Procedures Act, the two Federal circuits which have considered the issue, have applied the balancing test of Rovario.[267]

In United States v. Smith, a former military intelligence officer charged with espionage in Federal district court, sought to introduce classified information concerning operations that he had participated in two years earlier than the alleged offenses.[268] This evidence was unquestionably relevant to his later successful defense that he mistakenly thought that he was acting as double agent for the United States when he passed classified information to the Soviets. Noting that "[t]he government has a substantial interest in protecting sensitive sources and methods of gathering information. . .",[269] the Fourth Circuit remanded the case to have the district court test for more than relevance by balancing the public interest in nondisclosure versus the accused's interest in disclosure.[270] Unfortunately, the court said little more

other than to indicate that the government had a substantial interest in protecting classified information.

Likewise, any military court applying the Rule 505 classified information privilege standard, will turn to Rovario and, in particular Smith. However, in those instances where the government seeks to prevent disclosure of classified information to the defense altogether, the government may articulate its interest in nondisclosure by motions considered ex parte, in camera by the judge. Since the judge need only make findings where disclosure at trial is directed,[271] a decision authorizing other than full disclosure could be made essentially without explanation. Clearly, if this procedure is followed, no meaningful guidelines involving classified information will develop.[272] As discussed previously, to avoid this problem, the military judge should require that materials in support of claims of privilege be disclosed to at least defense counsel. Alternatively, the materials should be summarized in a fashion to reduce or eliminate particularly sensitive classified information.

In those instances where the defense seeks to disclose at trial classified information already known to the accused, the military judge must consider that disclosure of classified information could be made at sessions closed to the public.[273] At these sessions, the government would have a very limited interest in preventing properly cleared members from gaining access.

Thus, because in military practice court-martial sessions can be closed to the public, there is simply little need for the government to claim that classified information is privileged from disclosure. Where the defense establishes relevance and the slightest need, military judges should authorize disclosure at closed sessions. Then, the military judge should make a second determination balancing the government's interest in non-disclosure at sessions open to the public. Considering the availability of disclosure at closed sessions, the military judge is left with balancing the interest of the government in nondisclosure against interests of the accused and society in a public trial.

IV. The Right to a Public Trial and the Closing of Courts-Martial for Security.

Assuming that security clearances and access have been granted to the defense and that at least some classified information is relevant and necessary to the prosecution or the defense during the merits of a case, the issue of closing sessions to the public is raised. This section of the thesis examines a third ingredient of a fair trial -- the right to a public trial. Again, this is another right expressly guaranteed by the Sixth Amendment of our Constitution.[274]

A. Historical Background.

Generally regarded as basic right stemming from "the ancient privileges of Englishman," the right to a public trial is widely regarded as a safeguard against the excesses of the Star Chamber Courts of the seventeenth century.[275] By having trials open to the public, it has been assumed that government officials would be more reluctant to go after innocent citizens.[276] Thus, public trials serve as a check against possible judicial abuse.[277] However, certainly the carnival atmosphere to some public trials does little to enhance fair outcomes.[278]

It has also been assumed that another reason for open trials is that witnesses are more likely to tell the truth in public then in private.[279] But, in many instances, witnesses may be less likely to tell fully the truth in public rather than privately disclose embarrassing or unpopular evidence.

A third reason for having public trials is that by chance witnesses with relevant information might attend the trial and then step forward with testimony refuting or corroborating evidence presented in public. While it is conceivable that this may have happened in small communities back when certain trials were also social events, it's ludicrous to suggest that a witness with access to classified information would fortuitously appear at a trial to supply relevant classified information.

The last and certainly best reason for having public trials is that they encourage public confidence in judicial determinations. Apart from assuring that individual cases are correctly decided, a free society

has a fundamental interest in learning about and discussing what transpires in court. As one court observed: "Secret hearings--though they may be scrupulously fair in reality--are suspect by nature."[280] In short, society has an interest in seeing justice done.

Despite the fact that the both the United States Constitution and many State constitutions[281] guarantee the right to a public trial, only a few federal courts have addressed the right to a public trial prior to the World War II.[282] In 1917, the Eighth Circuit broadly construed the term "public trial as a trial at which the public is free to attend."[283] But, there was a split between circuits as to whether an accused need show actual prejudice where portions of his trial were closed to the public.[284]

B. United States v. Oliver.

The Supreme Court first addressed the public trial issue in United States v. Oliver.[285] The Supreme Court reversed a criminal contempt conviction of a defendant tried at a secret trial before a judge who, while serving as a one man grand jury authorized under state law, concluded that the accused was lying. The accused was tried in secret without the opportunity to consult with counsel.[286] Because of state grand jury secrecy rules, the accused had no opportunity to confront the other witnesses who had testified against him.[287] Moreover, only a portion of the record of the proceedings against the accused were transcribed for appellate review.[288] The Supreme Court held that since the

accused had no reasonable opportunity to defend himself the conviction violated due process.[289]

Notwithstanding the actual holding, most of the opinion focused on the secret trial aspects of the case. The Court noted that with perhaps the exception of courts-martial, there was no instance of a criminal trial having been conducted in camera.[290] The Court conducted a historical analysis noting that "by immemorial usage, whenever the common law prevails, all trials are in open court, to which spectators are admitted."[291]

The opinion made no mention of whether the press and public had an independent First Amendment interest in attending criminal trials.[292] And because of the egregious due process defects with Oliver at trial, it was impossible to definitively determine what was the exact extent of the accused's public trial right.

C. Post-Oliver Public Trial Developments

Shortly after Oliver, the Third Circuit Court of Appeals held that the Sixth Amendment precluded the indiscriminate exclusion of the public from the trial of several accused charged with transporting women for immoral purposes in violation of the Mann Act.[293] Spectators, including young girls, filled the court-room.[294] The trial court made no effort to narrow its order excluding the entire public; and, over the objection of one defendant, the court was cleared entirely of spectators.[295] Leaving open the issue of excluding the public to protect tender aged witnesses

from embarrassment, the Third Circuit reversed holding that accused's the Sixth Amendment right to a public trial precluded such a general exclusion.[296]

Deciding that the right to a public trial accrues chiefly to the accused, the Third Circuit also held that a defendant may waive his right to a public trial.[297] Where the public was excluded, except for the members of the press and relatives and friends of the accused and child witnesses, the Ninth Circuit sustained the order holding that "the Sixth Amendment right to a public trial is a right of the accused, and of the accused only."[298]

Though the courts first focused on the accused's right to a public trial, the courts gradually began to recognize that the public had an interest in public trials separate and distinct from that of the accused. Where the right to waive a jury trial was at issue, the Supreme Court implicitly recognized society's interest in a public trial by noting that the accused had no right to a closed trial.[299]

In Lewis v. Peyton,[300] the Fourth Circuit reversed where a trial moved to the remote, rural home of a bed-ridden eighty-seven year old rape victim. The Court held that the accused couldn't waive his right to a public trial.[301] The court observed that public trials were for the sake of the public, as well as the accused.[302] Similarly, noting that it was crucial for the public to know what transpires during police station interrogations, the Third Circuit reversed where the public was excluded from a hearing on the admissability of a confession.[303]

Thus, the Federal Courts began balancing the interests of society and the accused in a public trial against any competing interest in a less than fully public trial. In United States ex rel. Orlando v. Fay,[304] a partial exclusion of the public was sustained as an "acceptable balance" between the interest in having an open trial and closing the courtroom.[305] In Fay, the judge removed spectators except members of the press to protect witnesses and jurors from harassment and intimidation.[306] Similarly, where some outsiders were permitted to remain as well as the press, the Second Circuit sustained a trial judge's exclusion of most of the spectators to protect a witness who had declined to testify in front of, in his own words, the "gang in the courtroom."[307]

Balancing the privacy interest of the accused against the general interest in a public trial, the Third Circuit unsealed transcripts of closed proceedings challenging the lawfulness of wiretaps after determining that the accused had no privacy interest in the contents of lawful intercepts.[308] Where a trial court failed to hold a hearing to balance the competing interests, a conviction was still upheld where the appellate court took judicial notice of the government's interest in closing the court during the testimony of police agents still engaged in undercover police work.[309] Partial exclusion of the public where a minister and members of the press were permitted to remain in the courtroom during the testimony of a rape victim has also been sustained.[310]

Finally, in a plurality decision, the Supreme Court held that there was a First Amendment interest of the press in access to criminal trials which must be balanced against the right of the accused to a fair trial.[311] In Gannett, the accused, trial judge, and prosecutor all agreed to close preliminary hearings from the press and public.[312] Noting that pretrial publicity of suppression hearings posed specials risks of unfairness, the Court sustained closing the proceedings where a reasonable probability of prejudice existed.[313]

In Richmond Newspaper Inc. v. Virginia,[314] the Court addressed the right of public access at the trial proper as opposed to pretrial proceedings. While the Court had reversed convictions where there was too much publicity and public access,[315] the Court held that the right to attend criminal trials was "implicit in the guarantees of the First Amendment."[316] The Court required that before a trial court exclude the public, the judge must articulate an overriding interest in excluding the public in findings.[317]

Since Richmond Newspaper, the Court has required an articulated overriding interest in closing proceedings, notwithstanding a state statute requiring closure.[318] In Globe Newspapers v. Superior Court,[319] on appeal, the state advanced two interests protected by a state statute requiring closing court during testimony of rape victims under age eighteen. First, the state urged that the statute enabled young witnesses who could not testify before an audience to testify under less traumatic circumstances. The Supreme Court

rejected the mandatory requirement holding that there must be an individualized determination that closure is necessary to protect the witness.[320] Second, the state argued the statute encouraged victims and their parents to come forward knowing that the tender aged victim wouldn't have to testify in court. Noting a lack of empirical evidence and relying on common sense, the Court rejected this argument, too.[321]

In Press Enterprise v. Superior Court (Press Enterprise I),[322] where the public was excluded from individual, but not general, voir dire, the Court remanded for a determination as to each juror's privacy interest before release of the transcripts of the proceedings.[323] The Court held that "[t]he presumption of openness can be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[324] Again, the Court was narrowing a broad denial of public access. Furthermore, the Court has extended the requirements of Press Enterprise I to challenges raised by the accused as well as the press.[325]

From these cases, particularly Press Enterprise I, several conclusions can be drawn. First, the accused, prosecutor, and judge can not simply agree to close the proceedings. Second, before denying the public full access to a criminal proceeding, the court must consider alternatives including partial exclusion of the public or, in case of broad publicity problems, sequestration of the jury. Thirdly, the judge must articulate in findings what overriding interest is

being protected by closure. And, lastly, the closure must be as narrow as possible.

D. Public Trials in the Military.

While our courts-martial system is rooted in the same Anglo-Norman system in which courts were open and prosecutions were "public and verbal,"[326] historically courts-martials retained the discretion to remain closed to the public. Noting that in the majority of cases "the Court is pronounced by the President to be open . . . to the public," Colonel Winthrop, reporting on nineteenth century military practice, observed that "at any stage of the trial it may be permanently closed at the discretion of the court."[327]

Yet, in the early unofficial and official Manuals for Courts-Martial, there is no mention of excluding the public from courts-martial except during deliberations.[328] In 1917, the Manual first expressly authorized courts-martial, in their discretion, to close the proceedings to the public.[329] This provision was later expanded to authorize the convening authority to direct whether proceedings were to be closed and narrowed to require "good reasons" for closing a courts-martial.[330] In 1949, the Manual expressly authorized closing courts-martial for security reasons.[331] Similar language appeared in the 1951 Manual,[332] which implemented the Uniform Code of Military Justice.[333]

In 1969, the provision concerning spectators was furthered revised and still authorized the closing of courts-martial for security reasons.[334] For the first

time, the Manual expressly called for a balancing of the accused's right to a public trial against the government's interest in closing the proceedings.[335] Only to prevent the disclosure of classified information could an entire trial be completely closed.[336]

Rule for Courts-Martial 806 replaced the previous Manual provisions concerning spectators. Courts-martial are still generally open to the public.[337] For good cause, the military judge, and no longer the convening authority, may reasonably limit the number of spectators or close a session, but only when expressly authorized elsewhere in the Manual can the military judge close a session over the objection of the accused.[338] And in cases involving the introduction of classified information, the Manual expressly authorized the exclusion of the public during portions of testimony disclosing classified information.[339]

Despite this express authority for closing court-martial sessions, there are only two reported cases where the defense challenged closing of the court for security reasons.[340] In United States v. Neville,[341] the convening authority directed that the trial of a field grade officer on charges of adultery, false swearing, failures to repair, and derelictions of duty, related to the filing of classified officer efficiency reports. Without mentioning the Sixth Amendment and only citing the Manual, the Army Board sustained the closing of the entire court-martial.[342]

Not for another twenty-five years did a military appellate court address the issue of closing courts-martial to protect classified information.[343] However,

appellate courts examined closing of courts-martial and otherwise limiting public attendance in a variety of circumstances.

In United States v. Zimmerman,[344] an Air Force Board of Review reversed an indecent exposure conviction where, over defense objection, the court excluded spectators including the accused's mother from the entire trial. Consistent with case law in federal courts,[345] the board held that excluding all spectators to protect witness "sensibilities" and to prevent embarrassment was without good reason as required by the Manual.[346] Conversely, an Air Force Board sustained the exclusion of the public during the testimony of a nine year old victim of sex offenses.[347]

In United States v. Brown,[348] the Court of Military Appeals reversed the accused's conviction for communicating indecent language, where the convening authority had directed closing the court-martial except for those persons specifically designated by the accused.[349] Concluding that since a civilian type offense was involved, there was no reason for departing from civilian rules,[350] the Court relied extensively on Oliver in reversing. But, the Court of Military Appeals noted that the Supreme Court had never decided a case where public disclosure of evidence endangered national security.[351]

Importantly, Brown also stands for the proposition that "in military law, unless classified information must be elicited, the right to a public trial includes the right of representatives of the press to be in attendance."[352]

In United States v. Grunden,[353] the Court of Military Appeals again addressed closing courts-martial for security reasons. In Grunden, an airmen was convicted of attempted espionage and failure to report contact with individuals he believed to be hostile intelligence agents.[354] While about sixty per cent of the trial was open to the public, the government presented virtually all of its case on the espionage charge in closed session.[355] Of the ten witnesses who testified in closed session, four made no mention of classified information, three mentioned such information once, and only one discussed classified information at length.[356] Concluding that the military judge "employed an ax in place of the constitutionally required scalpel," the Court reversed.[357]

While the Court announced that it was requiring that trial judges employ a balancing test,[358] instead the court prescribed procedures which will always result in the closing of proceedings during the introduction of properly classified information.[359]

In order to close the court-martial, trial counsel has the initial burden of demonstrating that the material to be presented in closed session has been properly classified by the appropriate authority in accordance with regulation.[360] The military judge doesn't conduct a de novo review of the classification decisions,[361] but rather decides whether classification determinations are arbitrary and capricious.[362] Precisely how the government satisfies its burden is not prescribed, but again it appears that the military

judge may consider in camera, ex parte materials in reaching his decision.[363]

Additionally, the Court directed that when only a portion of a witnesses testimony involved classified information, the government should bifurcate presentation of the testimony with only the classified information being introduced in closed session.[364]

Thus, Grunden prescribes minimizing closed sessions to testimony involving classified information. If the government need only demonstrate that a classification authority didn't abuse his discretion in deciding that disclosure of certain information might pose a reasonable danger to national security,[365] the governmental will invariably prevail in closing the proceedings. As with challenging claims of privilege, the defense is ill-equipped to dispute whether even "innocuous information" is properly classified,[366] let alone challenge whether information reveals valuable methods of operation.

In United States v. Gonzalez,[367] the latest case involving a challenge to closure of a court-martial for security reasons under paragraph 53e,[368] the Air Force Court of Military Reviewed sustained the conviction where the military judge followed Grunden and minimized the duration of closed sessions.

Rule for Courts-Martial 806 and Military Rule of Rule 505(j) concerning the introduction of classified information have replaced the Manual provision which authorized closing of the Grunden courts-martial.[369] Rule 505(j) is derived from both the administration proposed classified information procedures bill[370] and

Grunden.[371] Thus, Grunden remains applicable to sessions closed for classified information.

Since Grunden and Gonzales, there have been no cases in which the defense challenged the validity of closing courts-martial for security reasons.[372] Consistent with these cases, the Air Force Court of Military Review declined to close a court at the request of the accused where during sentencing proceedings the accused described the unpleasant conditions of pretrial confinement in a civilian jail.[373] On appeal, the Court noted that before courts-martial "the right to a public trial is as full and complete as in civilian courts."[374] Citing Richmond Newspapers, the Court indicated that an overriding interest articulated in findings of fact was a prerequisite to closing a courts-martial.[375]

In United States v. Hershey,[376] the Court of Military Appeals examined a military judge's decision to exclude the bailiff and the noncommissioned officer escorting the accused during the testimony of the accused's thirteen year-old daughter.[377] There were no other spectators at the accused's trial. Failing to follow Globe Newspaper Co. v. Superior Court,[378] the military judge closed the court without determining on an individual basis the maturity of the victim, the desires of the victim, or the interests of the accused and the rest of the victim's family. While the Court affirmed, concluding that the practical impact of the closure was limited because the two excluded persons were performing a governmental function and were not attending as spectators,[379] the Court cited Globe

Newspaper and the Press-Enterprise cases with approval.[380]

While neither Hershey nor any of the Federal cases addressed cases involving closure to protect classified information, application of the requirements of Press Enterprise I should almost invariably result in closure of proceedings where classified information must be introduced under Military Rule of Evidence.505 This is true so long as the party seeking to introduce the classified information can establish that the alternatives to full disclosure of classified information authorized under the Rule[381] are unsatisfactory.

First, the overriding interest is of course the protection of national security. Again, as previously discussed, it's extraordinarily difficult to challenge classification determinations.[382]

Second, aside from the alternatives to disclosure of classified information provided for in Military Rule of Evidence 505, there is really no other means of protecting the classified information from unauthorized disclosure, other than excluding the public. Excluding a portion of the public still creates a security risk. Closure of the court must still be tailored so as to minimize exclusion of the public from only those portions of the trial which actually involve the introduction or discussion of classified information.[383]

Third, before closing the court, the military judge should make written findings in support of the decision to close the court to aid in review and to

comply with Press-Enterprise I. Futhermore, these findings can be kept under seal.[384]

E. Other Limitations on Public Attendance at Courts-Martial.

Other factors can, of course, limit public attendance at a courts-martial. The size of the courtroom, as well as its location, can effectively preclude or limit the attendance of the public.

Regarding courtroom size, it is well settled that a courtroom need only be reasonably large.[385] A trial is public if spectators are seated to courtroom capacity.[386] So long as spectators are excluded without particularity or favoritism, a courtroom with space for only eighteen spectators satisfied a marine's right to a public trial.[387]

More significantly, public attendance at courts-martial can be limited or completely foreclosed depending on the trial location. For example, transferring proceedings in part overseas could certainly discourage attendance by the local public.[388] Military exigencies such as trying a case in a combat zone or on a ship at sea may likewise make public attendance of other than servicemembers impracticable.[389] Although only servicemembers are able to attend a trial, it is still public under the Manual.[390]

The issue becomes closer when the trial is held at a post or in a building where public access is restricted.[391] While the Air Force Court of Military Review has suggested that spectators are not authorized

to be on post by virtue of a trial,[392] the better practice is to allow the public on post or in the restricted facility with escorts if necessary.[393] Otherwise, members of the press and general public can be precluded from attending, not because court sessions are closed, but because the general public can't gain access to where the courtroom is.

F. In re Washington Post Co.

A complete analysis of closing courts-martial to protect classified information, requires lastly an examination of In re Washington Post.[394] This case is the only civilian federal case where the public was excluded from substantially all of the criminal proceedings -- a plea hearing and a sentence hearing-- against an accused. In a negotiated agreement between the United States and Ghana, the accused agreed to enter a plea of nolo contendere to two of eight counts of espionage stemming from his acquiring classified information from a low-level CIA employee in Ghana.[395] In exchange, the United States promised to jointly move for a suspension of the sentence so that the accused could be exchanged for individuals held in Ghana for alleged spying on behalf of the United States.[396]

Both the plea hearing and sentence hearing were held in camera[397] with the pleadings and transcripts kept under seal.[398] On motion, the hearings were not reflected in the court docket. The government requested secrecy urging that disclosure of the proceedings might jeopardize the exchange or pose a threat to

those held in Ghana. After the accused departed the United States, the court released the hearing transcripts and motions except classified affidavits from the Acting Secretary of State and the Acting Attorney General.[399]

The Fourth Circuit found procedural and substantive error with the District Court's action. First, the Circuit Court found that, as required by In re Knight Publishing Co.,[400] the Court had failed to give adequate notice to the public of the pending closure nor were reasonable steps taken to afford members of the public, who wanted to attend, an opportunity to comment upon on or object to the closing of the court.[401]

Moreover, as required by both Knight[402] and Press Enterprise I,[403] the District Court failed to articulate findings concerning the overriding interest supporting closure and the unavailability of alternatives to closing the court.[404] In accordance with Press Enterprise II,[405] the District court was required to make the following specific factual findings: "(1) closure serves a compelling interest; (2) there is a 'substantial probability' that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest."[406]

While these requirements have not been considered by any military court, there is, absent military exigencies, every reason to believe that these procedures will be required at courts-martial. In both United States v. Grunden and United States v. Hershey,

the Court of Military Appeals fully embraced civilian federal law regulating the closing of criminal trials to the public, so there is little reason to expect future deviation.

V. Conclusion.

Certainly, the government has a significant interest in protecting national security by preventing the unauthorized disclosure of classified information in connection with courts-martial. This interest is frequently at odds with the accused's fair trial interests. Procedures to protect classified information, including limiting defense counsel's access to classified information, claiming privilege with respect to specific items of classified information, and closing courts-martial to the public, can prevent the accused from receiving a fair trial.

While military procedures and case law attempt to strike a balance between these interests, the current law doesn't guarantee fairness. The standards in United States v. Nichols,[407] military precedent requiring the granting of access to any counsel, should be reversed and replaced with a balancing test which examines the availability of other counsel who present no security risk.

Second, requiring the defense to provide notice of the classified information it intends to disclose at trial, without imposing a reciprocal obligation upon the government to disclose information it will use to rebut that classified information, is fundamentally

unfair and constitutionally defective in view of Wardius v. Oregon.[408] Military Rule of Evidence 505 should be amended to provide for reciprocal discovery and until it is amended the government should be required to provide such discovery.

Third, absent truly extraordinary circumstances, the government should be barred from submitting for the military judges in camera review affidavits and materials ex parte in support of claims of other than full disclosure of classified information to the defense. It's virtually impossible to challenge a claim of privilege without at least knowing the general basis for the claim. Alternatives, such as disclosure to cleared counsel, but not the accused, afford the opportunity make a meaningful challenge.

Fifth, developments under the First and Sixth Amendment have complicated excluding the public from courts-martial. Prior to closing a session to protect classified information, the military judge conduct a hearing and make specific findings addressing: (1) the compelling national security interest served by closure; (2) how closure protects that interest; (3) what alternatives to closure were considered and why they won't work. Moreover, unless clearly impractical, notice and opportunity to object to closure should be provided to members of the public who could reasonably be expected to object.

This procedure will invariably result in the closing of courts-martial during the presentation of information which is properly classified. Certain trials involving intelligence agents or special

operators would be tried almost entirely in secret session, thereby depriving accused of a public trial.

The balancing procedures designed to protect both classified information and the accused right to be represented by counsel, to discover and present evidence in his defense, and to have a public trial, afford the accused little chance of successfully challenging classified information determinations. With the lack of intelligence experts available to the defense, the vague classification standards, and the deference the courts show to agency classification determinations, there is little indication that current classified information procedures guarantee fair trials.

NOTES

1. Military Rule of Evidence 505 defines classified information as "any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation to require protection against unauthorized disclosure for reasons of national security, and any restricted data as defined in 42 U.S.C. Section 2014(y)." Mil. R. Evid. 505(b)(1). The Rule further defines national security as "the national defense and foreign relations of the United States." Id. at (b)(2). What constitutes classified information will be discussed in some detail at pages 33-4, infra.

2. See Mil.R.Evid. 505.

3. See, e.g., 2 More Marines Linked to Fraternizing--Lawmakers Say Loss to Spies at Embassy May Exceed Estimate, The Washington Post, Apr. 4, 1987, at A1, col. 2.

4. See 18 U.S.C. §794 Gathering or delivering defense information to aid foreign government; Uniform Code of Military Justice art. 104, 10 U.S.C. § 904 (1982) [hereinafter cited as UCMJ] (Aiding the Enemy); UCMJ art. 106 (Spies); UCMJ art. 106a (Espionage); United States v. Rosenburg, 195 F.2d 583 (2d Cir.), cert. denied, 344 U.S. 838, rehearing denied, 344 U.S. 889 (1952), rehearing denied, 347 U.S. 1021 (1954), motion denied, 355 U.S. 860 (1957).

5. United States v. Walker, 796 F.2d 43 (4th Cir. 1986)(life sentence); United States v. Sobler, 301 F.2d 236 (2d Cir.), cert.denied, 370 U.S. 944 (1962)(life sentence); United States v. Dobr, 21 C.M.R. 451 (A.B.R. 1956) (twenty year sentence); United States v. Johnson, 15 M.J. 676 (A.F.C.M.R.1983)(thirty year sentence).

6. See Eisenberg, Graymail and Grayhairs: The Classified and Official Information Privileges Under the Military Rules of Evidence, The Army Lawyer, Mar. 1981, at 5; Woodruff, Privileges Under the Military Rules of Evidence, 92 Mil. L. Rev. 5, 31-52 (1981); Woodruff, Practical Aspects of Trying Cases Involving Classified Information, The Army Lawyer, June 1986, at 53.

7. This thesis will not focus in any detail on the many practical problems associated with prosecuting classified cases. For example, the recording equipment used by many court reporters as well as automated transcription equipment may not be approved for use with classified information (see Dept. of Army, Reg. No. 380-380, Security - Automation Security, para. 1-20 (13 Mar. 1987) [hereinafter cited as AR 380-380]). Also, finding secure facilities to prepare for and conduct trials is frequently a problem.

The total number of certain clearances and accesses is tightly regulated and centrally controlled. Getting scarce clearances for civilian and military can

be a bureaucratic nightmare (see Dept. of Army, Reg. No. 604-5, Personnel Security Clearance - Department of Army Personnel Security Program (1 Feb. 1984) [hereinafter cited as AR 604-5]).

Intelligence agents, frequently trained in interrogation techniques and the fabrication of deceptive cover stories, can be convincing liars either as witnesses or accused. Where prosecutions relate to cover companies of the United States, locating undercover agents, financial records, and tracing the financial and intelligence activities of intelligence operations can be extraordinarily difficult. Frequent destruction of documentary evidence under the guise of operations security can further complicate investigations.

Lastly, coordination with compartmented intelligence activities and particularly non-Department of Defense intelligence activities can be remarkably frustrating.

8. See United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343 (1957).

9. Mil.R.Evid. 505.

10. Id.

11. U.S. Const. amend. VI; Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707 (Speedy Trial)[hereinafter cited as R.C.M.]; R.C.M 806 (Public Trial).

12. Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).

13. R.C.M. 701 (Discovery); United States v. Brady 373 U.S. 83 (1963); United States v. Agurs, 427 U.S. 97 (1976).

14. U.S. Const. amend. VI; R.C.M 703 (Production of Witnesses and Evidence).

15. 18 U.S.C. app. §§ 1-16 (1982) (Classified Information Procedures Act)[hereinafter cited as CIPA].

16. Powell v. Alabama, 287 U.S. 45, 69 (1932). The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

17. UCMJ art. 27.

18. In the Army, this wasn't always the case. Prior to General Order 29 of 1890, the presence of defense counsel, military or civilian, was regarded as a privilege, not a right. Winthrop, Military Law and Precedents, (2d ed. 1896) at 166. [hereinafter cited as Winthrop.] Moreover, professional counsel were at one time required to communicate with the court only in writing and they were prohibited from questioning witnesses orally. Id. In fact, not until 1 March 1917 were soldiers afforded a statutory right to defense

counsel. Art. 17, Articles of War., ch. 418, 39 Stat. 650 (1916)(repealed 1950).

19. The accused is entitled to military counsel either detailed pursuant to Article 27 or by reasonably available military counsel selected by the accused. UCMJ art. 27,; R.C.M. 506(a). Whether a military counsel chosen by an accused is reasonably available is determined in accordance with Rule 506(b)(1) and Army regulations. R.C.M. 506(b)(1); Dept. of Army Reg. No. 27-10, Legal Services - Military Justice, para. 5-6d (1 Oct. 1986)[hereinafter cited as AR 27-10].

20. UCMJ art. 38(b).

21. United States v. Annis, 5 M.J. 351 (C.M.A. 1978); See also Henry v. Middendorf, 425 U.S. 25 (1976)(Sixth Amendment right to counsel doesn't apply to summary courts-martial); Applicability of the Sixth Amendment right to counsel to soldiers is a recent development. See United States v. Clay, 1 C.M.A. 74, 1 C.M.R. 74 (1951)(right to be represented by defense counsel part of military due process); United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963)(Sixth Amendment right to counsel inapplicable to servicemembers).

22. Annis, 5 M.J. at 353.

23. UCMJ art. 31; United States v. Gunnels, 8 C.M.A. 130, 23 C.M.R. 354 (1957); Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Tempia, 16 C.M.A. 249

(1969).

24. Para. 7-100, AR 380-5.

25. Compare para. 1-300 with para. 1-316, AR 604-5.

26. Para. 7-101, AR 380-5. There are three types of security clearances--confidential, secret, and top secret. Section 4, AR 604-5.

27. Para. 1-300, Dept. of Army Reg. No. 604-5, Personnel Security Clearance - Department of Army Personnel Security Program (1 Feb. 1984) [hereinafter cited as AR 604-5].

28. Id. at para. 7-102. Where sensitive compartmented information is concerned, eligibility for access is determined by the Commander, U. S. Army Central Personnel Security Clearance Facility, or The Assistant Chief of Staff for Intelligence, Headquarters, Department of the Army. Id. at para. 7-102(d) and app. F.

29. But see supra note 27.

30. Id. at para. 3-501 and app. C.

31. United States v. Harris, 9 C.M.A. 493, 26 C.M.R. 273 (1958)(British solicitor represented Air Force sergeant); United States v. George, 35 C.M.R. 801 (A.F.B.R. 1965)(Philippine attorney represented airmen); United States v. Easter, 40 C.M.R. 731

(A.C.M.R. 1969)(West German lawyer represented soldier); United States v. Soriano, 9 M.J. 221 (C.M.A. 1980)(Sailor sought to have Philippine lawyer represent him).

32. See Appendix H, AR 604-5.

33. Id. at I-3.

34. Id. at app. I-1.

35. Presumably, as the member of a bar, defense counsel will not have criminal convictions resulting in denial of a clearance.

36. Para. 2-100(b), AR 604-5.

37. 548 F.Supp. 227 (D.C. Md. 1981).

38. 18 U.S.C. app. §§ 1-16 (CIPA).

39. Jolliff, 548 F.Supp. at 233.

40. Id.

41. Id. at 231.

42. United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343 (1957).

43. Id. at 349.

44. Id.

45. Id.

46. 142 F.2d 503 (2d Cir. 1944).

47. Nichols, 23 C.M.R. at 349.

48. R.C.M. 502(d)(3)(A).

49. R.C.M. 502(d)(3)(B).

50. See UCMJ art. 27 (a lawyer can not have acted for both the defense and the government in the same case); United States v. Lovett, 7 C.M.A. 704, 23 C.M.R. (1957) (lawyer representing multiple accused are disqualified where conflict exists between accused).

51. Para. 16-4a(8), AR 27-10.

52. R.C.M. 109(a).

53. Para. 5-8, AR 27-10. However, the Office of The Judge Advocate General, is considering replacing the American Bar Association Model Code of Professional Responsibility with a separate ethics code tailored to military practice. See Draft Rules of Professional Conduct (Army) (Sept. 1986).

54. Para 16-4a(11), AR 27-10.

55. The regulation authorizes suspension for "attempting to act as counsel in a case involving a security matter by one who is a security risk." Para. 16-4a.(8), AR 27-10.

56. R.C.M. 109(a).

57. Id.; See also ch. 16, AR 27-10.

58. Nichols, 23 C.M.R. at 349.

59. Id.

60. 142 F.2d 503 (2d Cir. 1944).

61. Id. at 506.

62. Id.

63. Id. at 505.

64. Nichols, 23 C.M.R. at 350. The opinion notes that it is filed in opposition to the majority opinion. Id.

65. Id. at 351.

66. R.C.M. 905(c)(1).

67. Id.

68. Mil. R. Evid. 505(g)(1)(D).

69. R.C.M. 506(b)(2).

70. Para. 5-6d, AR 27-10.

71. See generally AR 604-5.

72. Para. 3-800 and app. F, AR 605-4.

73. Id. at para. 1-500 (Requests for waivers should be addressed to HQDA(DAMI-CIS) Washington, D.C. 20310.

74. See United States v. Gnibus, 21 M.J. 1 (C.M.A. 1985)(Proceedings delayed in order to clear civilian counsel).

75. In general, the accused must be brought to trial within 120 days of notice of preferral of the charges or imposition of restraint whichever occurs earlier. R.C.M. 707(a). Delays for good cause are excluded from the 120 day requirement. R.C.M 707(c)(8).

76. The prosection may also choose to claim that specific items of classified information are privileged from disclosure. See supra p. 24-6.

77. R.C.M. 505(d)(5).

78. R.C.M. 505(g)(1).

79. In Federal court, there are established procedures for handling classified material by court personnel as well as defense counsel. Judges can likewise issue protective orders further protecting classified information. See Security Procedures Issued Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information 18 U.S.C. app. § 9 note (1982) (References in Text) [hereinafter cited as Chief Justice's Security Procedures].

80. Mil. R. Evid. 505(g)(1)(B). See also ch. 5, AR 380-5. In some instances, information must be stored in certain types of storage containers in facilities with alarms and guards that can respond within ten minutes. Id. at para. 5-102(a)(3).

81. Mil. R. Evid. 505(g)(1)(C).

82. Mil. R. Evid. 505(g)(1)(E). Generally, the maintenance of such logs is required when top secret or sensitive compartmented information is involved. Para. 7-300, AR 380-5.

83. Mil. R. Evid. 505(g)(1)(F). See para. 7-304, AR 380-5.

84. In Federal court, except as provided by protective orders, defense counsel are not provided custody of classified information. In the discretion of the court, the defense may be granted access to classified

information in secure government facilities; however control of the information remains with a court appointed security officer. Para. 8a, Chief Justice's Security Procedures, supra note 79.

85. Working papers prepared by defense counsel containing classified information must be handled in accordance with AR 380-5. Para. 7-304, AR 380-5. Arrangements must of course be made to ensure that attorney-client confidences and secrets are preserved and that defense work product remains privileged.

86. Para. 1-20, AR 380-380.

87. Para. 5-201(b), AR 380-5.

88. The protective order issued by the military judge may request that the convening authority authorize assignment of security personnel. Mil. R. Evid. 505(g)(1)(G). In Federal court, the judge designates a security officer. Para. 2, Chief Justices Security Procedures, supra note 79.

89. Id.

90. DeChamplain v. McLucas, 367 F.Supp. 1291 (D.C. Cir. 1973), rev'd., 421 U.S. 21 (1975); United States v. Baasel, 22 M.J.505 (A.F.C.M.R. 1986).

91. United States v. DeChamplain, 46 C.M.R. 782 (A.F.C.M.R. 1972), aff'd., 46 C.M.R. 150 (C.M.A. 1973).

92. DeChamplain, 367 F.Supp. at 1296.

93. Id. at 1297-98.

94. Id.

95. Id.

96. Id. at 1295-96.

97. 420 U.S. 738, 758 (1975) (Though courts-martial convictions may be subject to collateral attack, Federal courts must refrain from intervening by way of injunction).

98. DeChamplain v. McLucas, 421 U.S. 21 (1975).

99. United States v. DeChamplain, 1 M.J. 803 (C.M.A. 1976).

100. United States v. Baasel, 22 M.J. 505 (A.F.C.M.R. 1986).

101. Id. at 507.

102. Id.

103. Id.

104. Id.

105. See supra notes 80-89 and generally AR 380-5.

106. See Brady v. Maryland, 373 U.S. 83 (1963); United States v. Agurs, 427 U.S. 97 (1976).

107. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ." U.S. Const. amend. VI.

108. Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280 (1826) (lawyer-client privilege).

109. United States v. Burr, 25 F. Cas. 30, 37 (C.C.D. Va. 1807)(No. 14,692)(Accused sought letter effecting United States foreign relations with Spain).

110. Totten v. United States, 92 U.S. 105 (1875)(Administrator of deceased Union secret agent who operated behind Confederate lines sought back payment of monthly salary).

111. Id.

112. Id. at 107.

113. Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912).

114. United States v. Haughen, 58 F.Supp. 436 (E.D. Wash. 1944), aff'd, 153 F.2d 850 (9th Cir. 1946).

115. Id.

116. Zagel, The State Secret Privilege, 50 Minn. L. Rev. 875, 904 (1966).

117. In Haughen, the district court relied in part on the Supreme Court decision in United States v. Kiyoshi Hirabayashi, 320 U.S. 81 (1943)(Japanese curfew cases). In Kiyoshi, the Supreme Court declined to define the "ultimate boundary" of the war power and held that "it [was] enough . . . [that there was] a rational basis for the decision . . . made. Id. at 102. In Haughen, there was no balancing of the right of the accused versus that of the government. Instead, the court excepted the government's rational basis for claiming privilege. Id.

118. 345 U.S. 1 (1953).

119. Id. at 19-20.

120. Id. at 12.

121. United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944)(No privilege where disclosure of unclassified employee reports barred only by Treasury Regulation); United States v. Beckman, 155 F.2d 580 (2d Cir. 1946)(No privilege where disclosure of witnesses disciplinary record barred by Office of Price Administration regulation).

122. Reynolds, 345 U.S. at 12.

123. United States v. Nixon, 418 U.S. 687 (1974).

124. In Nixon, the Court noted, "we are not here concerned with . . . the President's interest in preserving state secrets." Id. at 712 n. 19.

125. A diligent search failed to reveal any petition for certiorari to the Supreme Court challenging the Classified Information Procedures Act.

126. 8 C.M.A. 119, 23 C.M.R. 343 (1957).

127. United States v. Dobr, 21 C.M.R. 451 (A.B.R. 1956); United States v. Reyes, 30 C.M.R. 776 (A.F.B.R. 1960).

128. Dobr, 21 C.M.R. at 455.

129. Id.

130. Reyes, 30 C.M.R. at 786.

131. Id. at 787 n.3.

132. 142 F.2d 503 (2d Cir. 1944).

133. Manual for Courts-Martial, United States, 1969 (Rev. ed.), ch. 27 [hereinafter cited as MCM, 1969].

134. Id. at para. 151b(3).

135. The provision reads, in part, as follows:

> In a case of this type [involving classified information], adequate precautions should be taken to ensure that no greater dissemination of the confidential or secret evidence occurs than the necessities of the trial require. The courtroom should be cleared of spectators while evidence of this nature is being received or commented upon, and all persons whose duties require them to remain should be warned that they are not to disclose the confidential or secret information.

Id.

136. Exec. Order No. 12,198, 3 C.F.R. 151 (1980).

137. Fed. R. Evid. 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to

> an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

The rules originally proposed by the Supreme Court contained thirteen rules defining nine non-constitutional privileges including a state secret and other official information privilege. The proposed privilege rules were controversial. So to ensure passage, Congress passed a the bill substituting the current Rule 501 for the proposed individual rules. See Saltzburg & Redden, Federal Rules of Evidence Manual 200-202 (2d ed. 1977).

138. Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 505 analysis [hereinafter cited as Mil.R.Evid. 505 analysis].

139. S. Rep. No. 823, 96th Cong., 2d Sess. 1, reprinted in 1980 U.S. Code Cong. & Admin. News 4294.

140. Id. at 1-2 (citing Report of the Select Committee on Intelligence 1978, National Security Secrets and the Administration of Justice, 95th Cong., 2d Sess.).

141. Id. at 2 (citing Report of the Select Committee on Intelligence 1978, National Security Secrets and the Administration of Justice, 95th Cong., 2d Sess.).

142. Id. at 2. Where military counsel are involved graymail has never been a problem. In addition to any orders issued by the military judge, military counsel are bound by the provisions of AR 380-5. Para. 1-201, AR 380-5. Under certain circumstances, causing the disclosure of classified information to persons without clearances and access is a dereliction of duty in violation of Article 92, UCMJ. Id.

143. Id. at 2.

144. Id. at 2.

145. See S. Rep. No. 823, supra note 139 at 3; H. Rep. No. 831, 96th Cong., 2d Sess., pt. 1 at 10 (1980).

146. S. 1482, 96th Cong., 2d Sess. (1979); H.R. 4736, 96th Cong., 2d Sess. (1979); and H.R. 4745, 96th Cong., 2d Sess. (1979). All three bills were introduced on July 11, 1979.

147. H.R. 4745, supra note 146; See Mil.R.Evid. 505 analysis.

148. H. Rep. No. 831, supra note 145.

149. Exec. Order No. 12,198, supra note 136 (signed Mar. 12, 1980).

150. H.R. Conf. Rep. No. 1436, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Admin. News 4307.

151. 18 U.S.C. app. §§ 1-16 (CIPA).

152. Compare 18 U.S.C. app. § 2 (CIPA) and Mil.R.Evid. 505(b) (definitions of classified information and national security nearly identical).

153. Compare 18 U.S.C. app. § 4 (CIPA) and Mil.R.Evid. 505(g).

154. Compare 18 U.S.C. app. § 3 (CIPA) and Mil.R.Evid. 505(g)(1).

155. Or, before referral, the convening authority may authorize on his own. Mil.R.Evid. 505(d).

156. Compare 18 U.S.C. app. § 4 (CIPA) and Mil.R.Evid. 505(g)(2).

157. Compare 18 U.S.C. app. § 4 (CIPA) and Mil.R.Evid. 505(g)(2).

158. Compare 18 U.S.C. app. § 4 (CIPA) and Mil.R.Evid. 505(g)(2).

159. Compare 18 U.S.C. app. § 5 (CIPA) and Mil.R.Evid. 505(h).

160. Compare 18 U.S.C. app. § 5 (CIPA) and Mil.R.Evid. 505(h)(1).

161. Compare 18 U.S.C. app. § 5 (CIPA) and Mil.R.Evid. 505(h)(3).

162. United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983).

163. Id. at 1200.

164. Woodruff, Practical Aspects of Trying Cases Involving Classified Information, The Army Lawyer, June 1986, at 53.

165. Id.

166. (emphasis added) 18 U.S.C. app. § 5(a) (CIPA); Mil.R.Evid. 505(h)(1).

167. Notice must be provided prior to arraignment unless the military judge specifies a different date. R.C.M. 505(h)(1).

168. R.C.M. 505(h) analysis.

169. S. Rep. No. 823, supra note 139.

170. Id. at 7.

171. The prosecution may attack the credibility of its own witnesses. Mil.R.Evid. 607.

172. 18 U.S.C. app. § 4 (CIPA); Mil.R.Evid. 505(h)(2).

173. 18 U.S.C. app. § 5(b) (CIPA); Mil.R.Evid. 505(h)(5).

174. 18 U.S.C. app. § 6(f) (CIPA).

175. Mil.R.Evid. 505(h).

176. H. Rep. No. 831, supra note 145, pt. 1 at 23.

177. R.C.M. 701(a)(3)(B) and Fed. R. Crim. P. 12.1(b) (Reciprocal discovery required when defense provides notice of defense of alibi or lack of mental responsibility).

178. 412 U.S. 470 (1973).

179. Id. at 472.

180. Williams v. Florida, 399 U.S. 78, 81 (1970).

181. Wardius, 412 U.S. at 476.

182. United States v. Jolliff, 548 F.Supp. 229 (D. Md. 1981); United States v. Collins, 720 F.2d 1195 (11th Cir. 1983); United States v. Wilson, 570 F.2d 142 (2d Cir. 1984).

183. Collins 720 F.2d at 1200.

184. 18 U.S.C. app. § 6(f) (CIPA).

185. Wardius, 412 U.S. at 475.

186. 18 U.S.C. app. § 6(f) (CIPA).

187. Mil.R.Evid. 505(c).

188. United States v. Reynolds, 345 U.S. 1, 20 (1953).

189. See Ch. VIII, AR 380-5.

190. Id. at para. 8-101(e).

191. Mil.R.Evid. 505(c).

192. Mil.R.Evid. 505(b)(1). Classified information includes and any restricted data, as defined in 42 U.S.C. § 2014(y) (data related to atomic energy).

193. Exec. Order No. 12,356, 3 C.F.R. 166, 167, § 1.1(a)(3) (1982) reprinted in 50 U.S.C. § 401 app. at 51 (1982). The order provides for three types of classified information: confidential, secret, and top secret. Unauthorized disclosure of information classified secret should reasonably be expected to cause serious damage to national security. Id., § 1.1(a)(2). Disclosure of top secret information should cause exceptionally grave damage to national security. Id., § 1.1(a)(1). Department of Defense Directive No. 5200.1, Department of Defense Information Security Program (June 7, 1982), implements the executive order. The classification definitions are repeated with examples in service regulations. Para. 1-501 to 1-503, AR 380-5.

194. Id. at 168-69, § 1.3(a).

195. Id. at 169, § 1.3(b).

196. Mil.R.Evid. 505(c); 18 U.S.C. app. § 1 (CIPA).

197. Exec. Order No. 12356, supra note 193 at 169, § 1.3(d).

198. Id. at 169, § 1.3(c).

199. United States v. Nixon, 418 U.S. 687, 710 (1974).

200. United States v. Reynolds, 345 U.S. 1, 73 (1953).

201. United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

202. 5 U.S.C. § 552 (1982).

203. Weissman v. CIA, 565 F.2d 602 (D.C. Cir. 1977).

204. CIA v. Sims, 471 U.S. 159, 178 (1985) (Names of Universities engaged in brain-washing research for the CIA exempt from disclosure under FOIA); Halkin v. Helms, 598 F.2d. 1 (D.C. Cir. 1978)(Date and contents of accused's communications intercepted by NSA privileged).

205. Mil.R.Evid. 505(g)(2) and (i)(4)(A); 18 U.S.C. app. § 4, §6 (b)(1), and § 6(c)(2)(CIPA).

206. Mil.R.Evid. 505(1)(4)(B).

207. Mil.R.Evid. 505(i)(4)(C).

208. Mil.R.Evid. 505(I)(4)(D).

209. Id.

210. Mil.R.Evid. 505(i)(4)(E).

211. Mil.R.Evid. 505(i)(4)(E)(ii).

212. Mil.R.Evid. 505(i)(4)(E)(iv) and (v).

213. Mil.R.Evid. 505(i)(4)(E)(iii).

214. Mil.R.Evid. 505(i)(4)(E)(i).

215. Mil.R.Evid. 505(i)(4)(E).

216. 18 U.S.C. app § 7 (CIPA).

217. R.C.M. 908.

218. Mil.R.Evid. 505(j)(5). If the court-martial is to receive evidence in closed session, this subsection requires that the military judge, counsel and members have appropriate clearances. But cf. The Chief Justice's Security Procedures, supra note 79 at § 4 (Federal Judges and jurors not required to have security clearances).

219. 394 U.S. 165 (1969).

220. Id. at 181.

221. Id. at 182.

222. Id. at 184.

223. In United States v. Ivanov, the accused was convicted of conspiring to transmit to the Soviets information relating to national defense in violation of 18 U.S.C. 794(a) and (c). Id. at 169.

224. Id. at 185.

225. Id. at 198.

226. 394 U.S. 316 (1969).

227. Id. at 317.

228. Id.

229. United States v. Butenko, 494 F.2d 593 (3d. Cir.) (en banc), cert. denied sub nom. Ivanov, 419 U.S. 881 (1974).

230. 5 U.S.C. § 552.

231. Ponte v. Real, 471 U.S. 491, (1985).

232. 50 U.S.C. §§ 1801-1811.

233. United States v. Duggan, 743 F.2d 59 (2d Cir. 1984); United States v. Belfield aka Daoud Salahudddin Ali Abdul Nami, 692 F.2d 141 (D.C. Cir. 1982); United States v. Megahey 553 F.Supp. 1180 (D.C. N.Y. 1982), aff'd, 729 F.2d 1444 (2d Cir. 1983); United States v. Horton, 17 M.J. 1131 (N.M.C.M.R. 1984).

234. 18 U.S.C. § 1802.

235. 18 U.S.C. § 1806 (c) and (d).

236. 18 U.S.C. § 1806(f).

237. United States v. Duggan, 743 F.2d 59 (2d Cir. 1984); United States v. Belfield aka Daoud Salahudddin Ali Abdul Nami, 692 F.2d 141 (D.C. Cir. 1982); United States v. Megahey 553 F.Supp. 1180 (D.C. N.Y. 1982), aff'd, 729 F.2d 1444 (2d Cir. 1983)

238. United States v. Jolliff, 558 F.Supp. 229 (D. Md.), United States v. Pringle, 751 F.2d 419 (1st Cir. 1984); United States v. Clegg, 740 F.2d 16 (9th Cir. 1984).

239. Belfield, 692 F.2d at 148.

240. Pennsylvania v. Ritchie, 324 Pa.Super. 557, 472 A.2d 220 (1984), aff'd, 502 A.2d 148 (1985), cert. granted, 106 S.Ct. 2444 (1986).

241. R.C.M. 906.

242. 328 F.Supp. 1077, 1088 (E.D. N.Y. 1971).

243. Lopez, 328 F.Supp. at 1090. See also United States v Bell, 464 F.2d 667 (2d Cir.), cert. denied, 409 U.S. 991 (1972).

244. 740 F.2d 16 (9th Cir. 1984).

245. 530 F. Supp. 8, 9 (D. D.C. 1981).

246. Mil.R.Evid. 505(i)(4)(B).

247. See 18 U.S.C. app. §§ 1-16 (CIPA).

248. United States v. Pringle, 751 F.2d 419 (1st Cir. 1984); United States v. Wilson 750 F.2d 7 (2d Cir. 1984); United States v. Smith, 780 F.2d 1102 (4th Cir. 1985).

249. See Rovario v. United States, 353 U.S. 53 (1957) and its progeny.

250. 353 U.S. 53 (1957).

251. Id. at 62.

252. Id. at 60-61.

253. United States v. Pitt, 382 F.2d 322 (4th Cir. 1967) (Warrant also contained verified details).

254. United States v. Green, 670 F.2d 1148 (D.C. Cir. 1981); United States v. Jenkins, 530 F.Supp. 8,9 (D. D.C. 1981); United States v. Harley, 682 F.2d 1018 (D.C. Cir. 1982)(Jury saw actual video tape of what the officers saw, but the location of the surveillance site wasn't disclosed).

255. United States v. Van Horn, 789 F.2d 1492 (11th Cir. 1986)(Jury listened to the audio tapes).

256. United States v. Lopez, 328 F.Supp. 1077 (E.D. N.Y. 1971); United States v. Bell 464 F.2d 667 (2d Cir), cert. denied, 409 U.S. 991 (1972).

257. United States v. Crumley, 565 F.2d 945 (5th Cir. 1978).

258. Harley, 682 F.2d at 1020.

259. Van Horn, 789 F.2d at 1508.

260. McCray v. Illinois, 386 U.S. 300 (1966)(Informant's identity remained privilege where defense needed disclosure not in connection with guilt or innocence, but only probable cause determination).

261. United States v. Valenzuela-Bernal, 458 U.S 858 (1982)(Disclosure not required although no other way to determine if the informant possesses relevant information); United States v. Bennett, 3 M.J. 903 (A.C.M.R. 1977); See Wellington, In Camera Hearings and the Informant Identity Privilege Under Military Rule of Evidence 507, The Army Lawyer, Feb. 1983 at 9.

262. United States v. Grisham, 748 F.2d 460 (8th Cir. 1984); United States v. Pantohan, 602 F.2d 855 (9th Cir. 1979); United States v. Skeens, 449 F.2d 1066 (D.C. Cir. 1971).

263. Valenzuela-Bernal, 458 U.S. at 870-71.

264. United States v. Hargrove, 647 F.2d 411, 414 (4th Cir. 1981).

265. Id.

266. United States v. Aguirre Aguirre, 716 F.2d 293 (5th Cir. 1983); United States v. Tenorio-Angel, 756 F.2d 1505 (11th Cir. 1985).

267. United States v. Pringle, 751 F.2d 419 (1st Cir. 1984); United States v. Smith, 780 F.2d 1102 (4th Cir 1985). While the federal courts have adopted the Rule 505 standard of necessary and relevant, it's unclear whether this is consistent with the legislative history of the Classified Information Procedures Act. The Senate reported, "It should be emphasized, however,

that the court should not balance the national security interests of the government against the rights of the defendant to obtain the information." S. Rep. No. 823, supra note 139 at 9. But, the Conference Report provided that "on the question of a standard for admissibility of evidence at trial, the committee intends to retain current law." H. Conf. Rep. 1436, supra note 150 at 8. Since the applicable standard is "relevant and necessary" under Military Rule of Evidence 505, there is no need to dwell on this inconsistency.

268. Smith, 780 F. 2d at 1104.

269. Id. at 1108.

270. Id. at 1110.

271. Mil.R.Evid. 505(i)(4)(C).

272. See United States v. Clegg, 740 F.2d 16 (9th Cir. 1984) (Trial court order requiring disclosure affirmed without explanation as to relevance and necessity of the classified information).

273. Mil.R.Evid. 505(j).

274. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. Const. amend. VI.

275. Radin, The Right to a Public Trial, 6 Temp.L.Q. 381, 381 (1932).

276. See United States v. Oliver, 333 U.S. 257 (1948).

277. Id. at 270.

278. See Estes v. Texas, 381 U.S. 532 (1965) (Filming of trial itself for daily news broadcasts violated due process); Sheppard v. Maxwell, 384 U.S. 333 (1966) (Trial judge's failure to protect accused from extensive pretrial publicity violated due process).

279. See 3 Blackstone, Commentaries, *375; Hale, History of the Common Law of England 343 (about 1670) (Runnington ed. 1820).

280. United States v. Cianfrani, 573 F.2d 835, 851 (3d Cir 1978).

281. See United States v. Oliver, 333 U.S. 257, 267-68 n. 15-20 (1948).

282. See United States v. Buck, 24 Fed. Cases 1289 (No. 14,680)(E.D. Pa. 1860)(Trial excluding blacks should have been open to the public).

283. Davis v. United States, 247 F. 394,5 (8th Cir. 1917).

284. Id. at 398-99 (prejudice presumed where trial closed to the public); Reagan v. United States, 202 F. 488 (9th Cir. 1913)(Accused must show actual prejudice).

285. United States v. Oliver, 333 U.S. 257 (1948).

286. Id. at 259.

287. Id.

288. Id. at 263-264.

289. Id. at 273.

290. Id. at 266 n. 12.

291. Id. at 266.

292. U.S. Const. amend. I.

293. United States v. Kobli, 172 F.2d 919 (3d Cir. 1949).

294. Id. at 920.

295. Id. at 921.

296. Id. at 923.

297. United States v. Sorrentino, 175 F.2d 721 (3d Cir. 1949)(Tried jointly with Kobli, accused's counsel expressly waived any objection to excluding the public).

298. Giese v. United States, 262 F.2d 151 (9th Cir.), reh'g denied, 265 F.2d 659,660 (1959), cert. denied, 361 U.S. 842 (1959); See also, Tribune Review Publishing Co. v. Thomas, 153 F.Supp. 486, 495 (D.C. Pa. 1957), aff'd, 254 F.2d 883 (3d Cir. 1958) (Right to a public trial is for accused's benefit).

299. Singer v. United States, 380 U.S. 24, 35 (1965).

300. 352 F.2d 791 (4th Cir. 1965).

301. Id. at 792.

302. Id.

303. United States ex rel. Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1969)(en banc).

304. 350 F.2d 967 (2d Cir. 1965), cert. denied sub nom., Orlando v. Follette, 384 U.S. 1008 (1986).

305. Id. at 971.

306. Id. at 971; But see, Harris v. Stephens, 361 F.2d 888, 891 (8th Cir. 1966)(No balancing of competing interest in capital case where "[c]losing of the courtroom during the testimony of the victim [was] . .

. a frequent and accepted practice when the lurid details of such a crime must be related by a young lady").

307. United States ex rel. Bruno v. Herold, 408 F.2d 125, 127 (2d Cir. 1969), cert. denied, 397 U.S. 957 (1970); See also, United States v. Eisner, 533 F.2d 987 (6th Cir. 1976) (Without evidentiary hearing judge cleared all but members of the press during one witnesses testimony where the witness feared spectators).

308. United States v. Cianfrani, 573 F.2d 835 (3d Cir. 1978).

309. United States ex rel. Lloyd v. Vincent, 520 F.2d 1272 (2d Cir.), cert. denied, 423 U.S. 937 (1975).

310. United States ex rel. Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977), cert. denied, 434 U.S. 937 (1975) (Tailored exclusion of public reduced aggravating the original injury by alleviating need for the rape victim to describe the "unwanted sexual encounter before persons with no more than a prurient interest"); See also Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984) (Public except members of the press and family members of the accused, the victim-witness, and the decedent excluded during testimony of the victim who had been raped and whose husband had been murdered).

311. Gannett Co. Inc. v. DePasquale, 443 U.S. 368 (1979).

312. Id. at 375.

313. Id. at 378.

314. 448 U.S. 555 (1980)

315. Estes v. Texas, 381 U.S. 532 (1965) (Filming of trial itself for daily news broadcasts violated due process); Sheppard v. Maxwell, 384 U.S. 333 (1966) (Trial judge's failure to protect accused from massive pretrial publicity violated due process).

316. Id. at 580.

317. Id. at 581.

318. Globe Newspapers v. Superior Court, 457 U.S. 596 (1982).

319. Id.

320. Id. at 608.

321. Id. at 609.

322. 464 U.S. 501 (1984).

323. Id.

324. Id. at 510.

325. Waller v. Georgia, 467 U.S. 39 (1984).

326. Snedeker, A Brief History of Courts-Martial, 10 (1954).

327. Winthrop, supra note 18 at 161. Citing an 1869 courts-martial, The Judge Advocate General of the Army noted:

> Except however when temporarily closed for deliberations courts-martial in this country are almost invariably open to the public during trial. R. 29, 34, June 1869. But in a particular case where the offenses charged were of a scandalous nature, it was recommended that the court be directed to sit with doors closed to the public. C. 1637, Aug., 1865; GCM Record No. 55974.

Digest of Opinions of the Judge Advocate General 516 (1912).

328. Murray, Manual for Courts-Martial 30 (3d ed. 1893); Manual for Courts-Martial and of Procedure Under Military Law 23 (2d ed. 1898); Manual for Courts-Martial, Courts of Inquiry, and Retiring Boards and of Other Procedures Under Military Law 24 (1905); Manual for Courts-Martial, Courts of Inquiry, and Retiring Boards and of Other Procedures Under Military Law 24

(1908)(Judge advocate conducts the case for the government in open session); Department of Army Regulations likewise make now mention of excluding the public from courts-martial except during deliberations. See e.g., Regulations for the Army of the United States No. 921 (1895)(Judge advocate withdraws during closed sessions); Regulations for the Army of the United States No. 970 (1904 with amendments to Dec. 31, 1905) (After a finding of guilty court reopened to receive evidence).

329. Manual for Courts-Martial, Courts of Inquiry, and of Other Procedures Under Military Law, 1917, para. 92.

330. Concerning public trials, the 1928 Manual provided:

> Excluding Spectators.--Subject to the directions of the appointing authority, a court-martial is authorized either to exclude spectators altogether or to limit their number. In the absence of good reason, however (e.g., where testimony as to obscene matters is expected), courts-martial will sit with doors open to the public.

Manual for Courts-Martial, 1928, para. 49e.

331. Paragraph 49e of the 1949 Manual reads as follows:

> Spectators--Except for security or other good reasons, as when testimony as to obscene matters is expected, the sessions of courts-martial will be open to the public. When practicable, notice of the time and place of sessions of courts-martial will be published in such a manner that persons subject to military law may be afforded opportunity to attend as spectators provided attendance does not interfere with the performance of their duties.

Manual for Courts-Martial, U. S. Army, 1949. para. 49e.

332. The provision also addressed photographing or broadcasting proceedings and read as follows:

> Spectators; publicity.--As a general rule, the public shall be permitted to attend open sessions of courts-martial. Unless otherwise limited by departmental regulations, however the convening authority or the court may, for security or other good reasons, direct that public be excluded from a trial. When practicable, notices of the time and place of sessions of courts-martial will be published so that persons subject to the code may be afforded opportunity to attend as spectators provided attendance does not interfere with the performance of their duties. See Also 118 (Contempts).

> The taking of photographs in the courtroom during an open or closed session of the court, or broadcasting the proceedings from the courtroom by radio or television will not be permitted without the prior written approval of the Secretary of the Department concerned.

Manual for Courts-Martial, United States, 1951, para. 53e.

333. 10 U.S.C. §§ 801-940 (1982).

334. MCM, 1969, para. 53e.

335. The provision read, in part, as follows: "The authority to exclude [spectators] should be cautiously exercised, and the right of the accused to a trial completely open to the public must be weighed against the public policy considerations justifying exclusion." Id.

336. Id.

337. Rule 806 provides: "In general. Except as otherwise provided in this rule, courts-martial shall be open to the public. For purposes of this rule, 'public' includes members of both the military and civilian communities." R.C.M. 806(a).

338. The Rule provides as follows:

> Control of Spectators. In order to maintain the dignity and decorum of the proceeding or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, exclude specific persons from the courtroom, and close a session; however, a session may be closed over the objection of the accused only when expressly authorized by another provision of this Manual.

R.C.M. 806(b).

339. Mil.R.Evid. 505(j)(5).

340. United States v. Neville, 7 C.M.R. 180 (A.B.R. 1952); United States v. Grunden 2 M.J. 116 (C.M.A. 1977).

341. 7 C.M.R. 180 (A.B.R. 1952).

342. Id. at 192.

343. United States v. Grunden, 2 M.J. 116 (C.M.A. 1977).

344. 19 C.M.R. 806 (A.F.B.R. 1955).

345. United States v. Kobli, 172 F.2d 919 (3d. Cir. 1949)(general public has right to attend trial although witnesses may suffer embarrassment); United States v. Sorrentino, 175 F.2d 721 (3d Cir.), cert. denied, 338 U.S. 868 (1949) (right to a public trial may be waived).

346. Zimmerman 19 C.M.R. at 816.

347. United States v. Frye, 25 C.M.R. 769 (A.F.B.R. 1957). See also Giese v. United States, 262 F.2d 151 (9th Cir. 1958)(per curiam), cert. denied, 361 U.S. 842 (1959)(exclusion of public during testimony of young child).

348. 22 C.M.R. 41 (C.M.A. 1956).

349. Id. at 44.

350. Id. at 45.

351. Id. at 46.

352. Id. at 48.

353. 2 M.J. 116 (C.M.A. 1977).

354. Id. at 119.

355. Id. at 120.

356. Id.

357. Id.

358. Id. at 121-22.

359. Id. at 122-24.

360. Id. at 123.

361. Id. at 122.

362. Id. at 123 n. 14.

363. Id. at 122 n. 13. The Court doesn't expressly mention whether the prosecution may submit materials to the military judge without disclosing their contents to the defense. However, the Court cites United States v. Reynolds, 345 U.S. 1 (1953), where materials were the government submitted materials ex parte to the judge for in camera inspection.

364. Id. at 123.

365. See supra pp. 35-42.

366. CIA v. Sims, 471 U.S. 159, 178 (1986).

367. 12 M.J. 747 (A.F.C.M.R. 1981), aff'd, 16 M.J. 428 (C.M.A. 1983).

368. MCM, 1969.

369. MCM, 1969, para. 53e.

370. H.R. 4745, supra note 146.

371. Mil.R.Evid. 505 analysis.

372. Recent cases involving classified information but no challenge to Rule 505 include: United States v. Gaffney, 17 M.J. 565 (A.C.M.R. 1983)(accused convicted of losing classified information through gross negligence); United States v. Baba, 21 M.J. 76 (C.M.A. 1985)(accused convicted of wrongfully communicating classified information to foreign agents); United States v. Baasel, 22 M.J. 505 (A.F.C.M.R. 1986)(Security officer sought to introduce evidence of his classified duties in connection with offenses related to his compulsive gambling).

373. United States v. Czarnecki, 10 M.J. 570 (A.F. C.M.R. 1980)(per curiam).

374. Id. at 571.

375. Id. at 572.

376. 20 M.J 433 (C.M.A. 1985).

377. Id. at 435.

378. 457 U.S. 596 (1982).

379. Id. at 437.

380. Id. at 436-7.

381. Mil.R.Evid. 505(h)(4)(D).

382. See supra pp. 31-34.

383. But see Mil.R.Evid. 505(j) which seems to provide for closing the courts-martial only during sessions in which classified information is introduced. If read literally, closing the court to hear closing arguments discussing classified information may not be authorized. Rule 505 should be amended to clearly authorize, when necessary, bifurcating each argument in two. A frequently more general unclassified argument could be made in open court and a more detailed argument containing classified information could be made in closed court.

384. In re Washington Post, 807 F.2d 383 (4th Cir. 1986).

385. Estes v. Texas, 381 U.S. 532 (1965).

386. Gaines v. Washington, 277 U.S. 81, 86 (1981).

387. United States v. Michaud, 48 C.M.R. 379 (N.C.M.R. 1973): See also United States v Gillars, 182 F.2d 965 (D.C. Cir. 1950)(accused's treason conviction stemming from German radio broadcasts in which she participated sustained where only a limited number of earphones available for press and spectators to listen to the broadcasts).

388. See Chenowith v. Van Arsdale, 46 C.M.R. 183 (C.M.A. 1973)(holding that requirements of the Sixth Amendment were inapplicable to proceedings transferred, in part, to Subic Bay, Philippines to hear witnesses from the U.S.S. Ranger).

389. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 806 discussion [hereinafter cited as R.C.M. 806 discussion].

390. Id.

391. See, e.g., United States v. Gonzalez, 12 M.J. 747 (A.F.C.M.R. 1981) aff'd. 16 M.J. 428 (C.M.A. 1983) (Trial held in a security facility where access to the public was restricted and all visitors required escorts).

392. United States v. Czarnecki, 10 M.J. 570, 572 n. 3 (A.F.C.M.R. 1980)(per curiam).

393. See, Gonzalez, 12 M.J. at 748(Spectators allowed in Air Force base security office with escorts); United States v. Longhofer, GCM 11 (U.S.M.D.W. 23 Sep. 86) (Spectators granted access to and provided escort to courtroom located in a sensitive compartmented information intelligence facility).

394. 807 F.2d 383 (4th Cir. 1986).

395. Id. at 386.

396. Id.

397. Representatives from Ghana's embassy attended; however, a newspaper reporter was excluded from both hearings. Id. at 386-87.

398. Id. at 397.

399. Id. at 387.

400. 743 F.2d 231 (4th Cir. 1984).

401. Id. at 390.

402. Knight, 743 F.2d at 234-35.

403. 464 U.S. 501, 510-511 (1984).

404. Id. at 391.

405. 106 S.Ct. 2735, 2741-44 (1986).

406. Id. at 392 (citation omitted).

407. United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343 (1957).

408. 412 U.S. 470 (1973).

APPENDIX A

PROPOSED CHANGE TO MILITARY RULE OF EVIDENCE 505

Military Rule of Evidence 505 is amended by inserting the following after subsection (i)(4)(E):

(F) Reciprocity.

(i) Notice by the Government. Whenever the military judge determines pursuant to subsection (i)(4)(C) that classified information, notice of which the accused provided pursuant to subdivision (h), may be disclosed in connection with a court-martial proceeding, the military judge shall, unless the interest of fairness do not so require, order the Government to provide the accused with information it expects to use to rebut the classified information.

(ii) Continuing duty to notify. The military judge may place the Government under a continuing duty to disclose such rebuttal information.

(iii) Failure to comply. If the Government fails to comply with the requirements of this subsection, the military judge may exclude any evidence not made the subject of notification and may prohibit the examination by the Government of any witness with respect to such information.